United States Court of Appeals

for the Second Circuit

APPENDIX

No. 76-7631

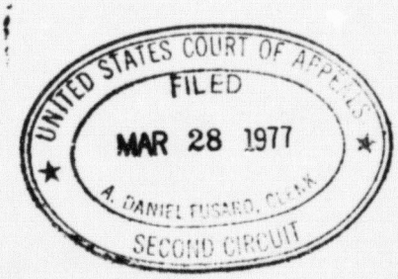
In the

United States Court of Appeals

For the Second Circuit

ORECK CORPORATION, *Plaintiff-Appellee,* vs. **WHIRLPOOL CORPORATION and SEARS, ROEBUCK AND CO.,** *Defendants-Appellants.*	Appeal from the United States District Court, Southern District of New York. — Honorable **Richard Owen,** Judge Presiding.

JOINT APPENDIX—VOLUME I.



Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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CIVIL DOCKET

UNITED STATES DISTRICT COURT

1

Jury demand date:

DC [illegible] 7-21-72 Jury 72 CIV 3215

TITLE OF CASE

[illegible]

[illegible],

vs.

SEARS ROEBUCK & CO. INC.

ATTORNEYS

For plaintiff:

[illegible]

12 East 41st St.
N.Y.C. N.Y. 10017

For defendant:

CROCK & CROCK & LAWN for Whirlpool Corp
41 Broadway,
N.Y.C. N.Y. 1004 425-1200

~~NATHANIEL PENNEBROCK~~ (3-20-74)
~~601 East 20th St~~
~~N.Y.C. 10010 Phone 477-1112 (for Defendant)~~

Joseph J. Skinner
~~240 West 41st St N.Y.C.~~ 1633 B'way, NYC 10019
(Sears Roebuck)

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO	REC	DISB.
J. 6 mailed X	Clerk	7/28/72	W.O.H./fm	15 —	
P. 6 mailed 7-13-72	Marshal	8/1/72	USA 2403	—	15 —
Cause of Action: 28 USC 2201, 15 U.S.C.	Docket fee				
Action arose at:	Witness fees				
	Depositions				

[redacted] JUDGE [redacted]

72 CV. 31

DATE	PROCEEDINGS
Jul28-72	FILED COMP'LAINT. ISSD SUMMONS.
Aug.24-72	Filed stip & order that time of deft. Sears,Roebuck & Co. to answer, with respect to the complaint is ext. from 8-23-72 to 9-22-72. So ordered. Frankel,J.
Sept-72	Filed & docketed complaint.
Sept8-72	Filed Affd. [illegible] WHIRLPOOL CORP. TO COMPLAINT.
Sept8-72	Filed Interrogatories by deft Whirlpool Corp. to Plaintiff.
Sep.8-72	Filed summons with marshal's ret. Served Whirlpool Corp. by Hannah Greenberg, Secy. on 8/18/72. Served Sears,Roebuck Co.Inc. by Sylvia Lands on 8/3/72.
Sep.7-72	Issued additional summons.
Sep.14-72	Filed additional summons with marshal's ret. Served Whirlpool Corp.(Regional Office) by Hannah Greenberg on 9/13/72.
Sep 20-72	Filed pltff's interrogatories to deft Whirlpool Corp Set No. 1.
Sep 20-72	Filed pltff's interrogatories to deft Sears, Roebuck & Co.,Inc. Set No. 1.
Sep 20-72	Filed notice of appearance for deft Sears,Roebuck and Co. & ANSWER. M.F.
Sep.25-72	Filed Notice of taking Deposition.
Sep.26-72	Filed Stipulation and Order extending deft. Whirlpool Corp.'s time to answer amended complaint to 9/29/72. So ordered. Frankel, J.
Sep 27-72	Filed Deft. Whirlpool Corp("Whirlpool") ANSWER to Amended Complaint.
Oct.10,72	Filed Deft(Sears Roebuck & Co.,Inc.) Stipulation and Order extending time from Oct.2) to Dec.1,72.So Ordered. Frankel, J.
Nov.13-72	Filed ~~Plaintiffs~~ Stip & Order extending Pltff's time to answer interrog of Deft, Whirlpool Corp from 10/16/72 to 11/10/72 and Deft.Whirlpool Corp. to Answer to Pltff's Interrog.,etc.from 10/16/72 to 11/30/72. So Ordered.Frankel, J.
Nov.20,72	Filed Pltff's Stip & Order extending time to answer [illegible], Whirlpool Corp. from 11/10/72 to 12/11/72.Frankel, J.
Nov.30,72	Filed Deft, Roebuck & Co,Inc. Stip & Order extending time to answer pltff's Interr, be extended from 12/1/72 to 1/3/ 73.Frankel, J.
Dec.8,72	Filed Pltff's Order to Show Cause before Hon.Frankel returnable 12/11/72,Room 706.
Dec.11,72	Filed Memo End. on Order to Show Cause dated 12/8/72.Motion withdrawn.So ordered. Frankel, J.
Dec.11,72	Filed Pltff's Stip & Order re:answer or object to interrogs.returnable 12/11/72 extended to 1/10/73.Frankel, J.
Dec.21,72	Filed Deft Sears,Roebuck&Co.Inc. Stip & Order extending time to answer pltff's interrogs. is extanded from 1/2/73 to 2/2/73. So Ordered.Frankel,J.
Jan.16,73	Filed Pltff's Answers to Interrogs of Deft. Whirlpool Corp.
Jan.17,73	Filed Pltff's Notice of Taking Deposition of: Whirlpool Corp.: Jack D.Sparks ,Dir.&Group Vice Pres. 2/15/73 John D. ,Product Mgr. Contract Sales Div., 2/20/73 Micha Gray II,Dir. on 2/28/73 Sidney L.Doyar,Dir.on 3/7/73 John M.Platts,Pres&Chairman on 3/14/73 John M.Woolridge,Consultant on 3/21/73 Carl [illegible]Webb, Consultant on 3/28/73 John H.Staub, Gen.Mgr. Contract Sales on 4/4/73 Stephen [illegible]Upton ,Vice-Pres. on 4/11/73
Jan.18,73	WHIRLPOOL'S ANSWERS toInterrogatories.
Feb.2,73	Filed Answer of Defts Sears,Roebuck & Co. to Pltff's Interrogs.
[redacted]	
Feb.11-74	Mailed notice of reassignment.
3/13/74	pre-trial before [illegible]

----Cont'd Page #3-----

D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS
May 20-74	Filed stip & order of substitution of deft. (Sears) attys--Owen, J.
Aug 14-74	Filed letter to Mr. Burghard t dtd 8/12/74 of change of address for Joseph M. Skinner.
11-19-74	PRE-TRIAL CONFERENCE HELD BY [illegible]
12-12-74	PRE-TRIAL CONFERENCE HELD BY [illegible]
Dec. 20-74	Filed stip Order-Documents & information contained therein shall not be disclosed by pltff. to any other persons except as provided below--Owen, J.
Dec. 20-74	Filed pltff's request for production
~~Dec. 20-74~~	~~Filed stip & order of discontinuance--Cooper, J.~~ [illegible]
Dec. 20-74	Filed pltff's notice of taking deposition
Jan 20-75	Filed Report & Recommendation by Magistrate Goettel.
Feb. 13-75	Filed order-objections to interrogs. are denied and granted as indicated. Compliance with this order shall be effectuated by Whirlpool and Sears no later than 30 days from the date of entry of this Order--Owen, J.--consented to.
3-7-75	PRE-TRIAL CONFERENCE HELD BY [illegible]
Mar 20-75	Filed Whirlpool's Supplemental Answers to interrogs.
Apr 25-75	Filed Deft. Whirlpoor Corp. Notice of Motion for order to compel supplemental & addt'l Answers to Interrogs. ret 5/9/75.
Apr 25-75	Filed Deft. Whirlpool Corp. Memorandum of Law.
May 1-75	Filed pltff's memorandum of law in opposition to motion to require supplemental & addt'l answers to interrogs.
5-9-75	PRE-TRIAL CONFERENCE HELD BY [illegible]
May 16-75	Filed Magistrate Goettel's Report and Recommendation.
Jun 20-75	Filed Memo Endorsed on motion filed 4-25-75: Ordered that interrogatory 11 be answ except that the names of dealers in the Oreck organization need not be given in the absence of confidentiality agreement, and that 90 and 91 shold be supplemented if the defts answer now differs from that previously given. and that interrogatories 2 24, 25, 50, 53, 54, 56, 68, 72, 78, 79, 80, 83 & 85, and 86 should be answered. Owen, J.
Jul 14-75	Filed letter of Malcolm A. Hoffman dated 6-19-75.
08-05-75	Filed Pltff's. supplemental answers to Deft's. (Whirlpool) interrogs.
01-16-76	PRE-TRIAL CONFERENCE HELD BY Owen, J.
02-09-76	**Filed deposition of Whirlpool Corp. by Jack D. Sparks on 5-21-74. (mailed notice)**
02-09-76	**Filed continued deposition of Whirlpool Corp. by Jack D. Sparks on 5-22-74. (mailed notice)**
02-09-76	**Filed deposition of Lowell G. Holder on 9-24-74. (mailed notice)**
04-05-76	Filed Pltff's. interrogs. to Deft. Whirlpool Corp. - Second Set.
04-05-76	Filed Pltff's. interrogs. to Deft. Sears, Roebuck - Second Set.
04-05-76	Filed deposition of the Pltff. by Robert J. Miller on 12-13-74. (mailed notice).
04-05-76	Filed deposition of Whirlpool Corp. by John D. Payne on 7-9-74. (mailed notice).
04-05-76	Filed continued deposition of Whirlpool Corp. by John D. Payne on 7-10-74. (mailed notice)
04-05-76	Filed continued deposition of Whirlpool Corp. by John D. Payne on 7-11-74. (mailed notice)
04-14-76	Filed deposition of Whirlpool Corp. by John D. Payne on 1-14-74. (mailed notice)
04-14-76	Filed deposition of Whirlpool Corp. by Jack D. Sparks on 8-1-73. (mailed notice)
04-14-76	Filed continued deposition of Whirlpool Corp. by Jack D. Sparks on 8-2-73. (mailed notice).
04-14-76	Filed continued deposition of Whirlpool Corp. by Jack D. Sparks on 9-11-73. (mailed notice).
04-14-76	Filed continued deposition of Whirlpool Corp. by Jack D. Sparks on 10-[illegible]-73. (mailed notice)
04-14-76	Filed continued deposition of Whirlpool Corp. by Jack D. Sparks on 10-17-73. (mailed notice)

DATE	PROCEEDINGS
07-13-76	Filed Judgment #76,672 - That Pltff. have judgment against the Defts, on the first & second claims in the sum of $2,250,000. The remaining claims are dismissed with prejudice.....Clerk.. Entered 7-15-76. (mailed notice)
7-16-76	Filed Memo End. on Dfts. Motion for Stay of Proceedings to enforce judgment Motion Granted as indicated. Owen J. (mailed notice)
08-24-76	Filed transcript of record of proceedings dated June 14,15,16,17,18, 21, 1976.
08-24-76	Filed transcript of record of proceedings dated June 22,23,24,25,1976.
08-24-76	Filed transcript of record of proceedings dated June 28,29,30, July 6, 1976.
08-17-76	Filed Pltff's. application for attorneys' fees and other costs of suit.
08-17-76	Filed Pltff's. memorandum in support of Pltff's. application for the cost of suit including a reasonable attorney's fee.
09-10-76	Filed Defts', memorandum in opposition to Pltff's. application for cost of suit including a reasonable attorney's fee.
09-24-76	Filed Pltff's. memorandum in opposition to Defts', motion seeking judgment notwithstanding the verdict or a new trial.
10-4-76	Filed reply affidavit of Malcolm Hoffmann in support of pltff applica for cost of suit and reasonable attorneys fee.
10-4-76	Filed pltffs reply memo in support of application for reasonable atthrn
10-18-76	Filed Dfts. Whirlpool Corp. & Sears Roebuck & Co. Motion for Extension of Stay Pending decision on Post Trial Motions.
10-18-76	Filed Memo. End. on Dfts. motion dtd. 10-18-76. Granted as indicated. Owen J. (mn)
12-8-76	Filed memo and opn dated 12-8-76 re motion ... motion is granted [illegible]
12-10-76	Filed memo ...I conclude htat under all the facts and circumstances o and in the exercise of discretion, a fair and reasonable allowance to is $125,000.00 and $4,000.00 for transcripts etc. Submit order on reas

	PROCEEDINGS	Date Order or Judgment Note
7[illegible]	Filed Defts', Whirlpool's second set of interrogs. to Pltff.	
[illegible]	[illegible] to Pltff's. second set of interrogs.	
[illegible]	Filed Pltff's. request for admissions.	
[illegible]	Filed Pltff's. answers to Defts'., Whirlpool's second set of interrogs.	
[illegible]	[illegible] to Pltff's. second set of interrogs.	
[illegible]	[illegible]	
[illegible]	[illegible]	
[illegible]	[illegible]

L DOCKET CONTINUATION SHEET

AINTIFF	DEFENDANT	72 Civ 3215 RO DOCKET NO.
leck Corporation	Whirlpool Corporation	PAGE ... OF ... PAGES

DATE	NR	PROCEEDINGS
1-7-		Filed memo end. on unfiled motion .... this motion is moot, the court having ruled on the pending post trial motion.
15-76		Filed notice of appeal to USCA by defts from final judgment of 12-7-76 m/n
[illegible]		[illegible]
23/76		Filed designation of exhibits by attorneys for defendant Whirlpool Corporation to be made part of the record on appeal.
[illegible]		
10--77		Filed counter judgment # 77,166..... ordered that pltff have judgment against defts for attorney's fee in amt of $125,000.00. and against defts for futher amt of $5,000.00 for costs. Owen J. Judgment ent. 1-10--77 Clark. (ent. on docket 1-12-77) m/n
7-77		Filed stipulation and order designating true copies of certain exhibits brought into evidence, which are presently missing, to the U.S.C.A.. Owen J. dtd: 1-17-77
9-77		Filed [illegible] that [illegible] transmitted to C'of A
2-3-77		Pltff's supplemental record on appeal
/2/77		Filed stipulation designating exhibit(pltff's exhibit 105, a physical exhibit) to be transmitted as part of the record on appeal.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORECK CORPORATION, Plaintiff, -against- WHIRLPOOL CORPORATION and SEARS, ROEBUCK & CO., INC., Defendants.	:	PLAINTIFF DEMANDS A TRIAL BY JURY 72 CIV. 3215 (MEF) AMENDED COMPLAINT

Plaintiff by its attorneys, the Law Firm of Malcolm A. Hoffmann, for its Amended Complaint alleges:

Jurisdiction and Venue

1. This is a civil antitrust action for injuries to plaintiff's business or property in violation of the Sherman and Clayton Antitrust Acts, 15 U.S.C. Sections 1, 13 and 18.

2. This Court has jurisdiction of the claims under 15 U.S.C. Sections 15 and 26 and 15 U.S.C. Sections 1, 13 and 18 and 28 U.S.C. Section 1337.

3. Plaintiff Oreck Corporation ("Oreck") is a corporation duly incorporated under the laws of the State of New York, having its principal place of business in the State of Connecticut.

4. On information and belief, defendant Whirlpool Corporation ("Whirlpool") is a corporation duly incorporated

under the laws of the State of Delaware, having its principal place of business in the State of Michigan.

5. On information and belief, defendant Sears, Roebuck & Co., Inc. ("Sears, Roebuck") is a corporation duly incorporated under the laws of the State of New York, having its principal place of business in the State of Illinois.

6. Defendants Whirlpool and Sears, Roebuck reside, are found and transact business in the Southern District of New York. 15 U.S.C. Section 22.

First Claim

7. Whirlpool is a major manufacturer of domestic appliances sold in the United States and elsewhere and in 1957 entered the business of manufacturing and selling electric vacuum cleaners through the acquisition of Birtman Electric Company, Chicago, Illinois ("Birtman").

8. Birtman had been a principal supplier of electric vacuum cleaners to Sears, Roebuck which sold the vacuum cleaners under the "Kenmore" name and label. After 1957 Whirlpool continued supplying vacuum cleaners to Sears, Roebuck for sale and distribution under the "Kenmore" name and label.

9. In 1958 Whirlpool began sale and distribution of vacuum cleaners under its own "Whirlpool" name and label. Sales of "Whirlpool" vacuum cleaners declined in 1960, and in 1961

Whirlpool discontinued the sale of vacuum cleaners under its own name and label.

10. On information and belief, Whirlpool was still convinced that vacuum cleaners could be successfully marketed under the "Whirlpool" name and label through a separate distribution system. On April 10, 1963 Whirlpool requested Oreck to establish a national sales and service organization to distribute vacuum cleaners under the "Whirlpool" name and label in the United States. After negotiations Whirlpool and Oreck entered into a distribution agreement dated August 7, 1963 pursuant to which Oreck became Whirlpool's exclusive distributor in the United States of America and its possessions for a term of five years with provision for automatic extensions for successive one year terms.

11. Under the agreement of August 7, 1963 Oreck was required to establish a large dealer organization, to merchandise, advertise and promote Whirlpool's products and to establish a national service organization with substantial inventories of parts. Oreck was required to furnish labor to service Whirlpool's warranties without compensation. Whirlpool's market power and position enabled it to impose this substantial financial investment upon Oreck and to extract numerous other contractual provisions advantageous to Whirlpool and onerous to Oreck.

12. Whirlpool has manufactured the vacuum cleaners

referred to herein in the State of Minnesota, has manufactured the other commodities referred to herein in the State of Indiana, and has delivered them to Oreck and Sears, Roebuck in New York, Connecticut, Illinois and other states other than Minnesota and Indiana, from which states such commodities have been sold and distributed throughout the United States and its possessions, all in and affecting interstate commerce.

13. Pursuant to the agreement of August 7, 1963, Oreck invested substantial amounts of money and time and effort into building up the distributorship organization. In reliance upon the distributorship agreement of August 7, 1963, Oreck built up the sales of Whirlpool products to a point far exceeding Whirlpool's sales on its own behalf during 1959-1961. In addition, Oreck played a major role in the development and testing of the Whirlpool line of upright vacuum cleaners, to the substantial benefit of Whirlpool and Sears, Roebuck.

14. On information and belief, Oreck's success in selling and distributing Whirlpool products became so great as to begin to compete seriously with Sears, Roebuck's sales of "Kenmore" vacuum cleaners, causing Sears, Roebuck to express its concern to Whirlpool.

15. As a consequence of the foregoing, Whirlpool embarked upon a systematic program of using its great market power and position to eliminate any serious competition to Sears, Roebuck from Oreck. In a letter dated August 29, 1968

Whirlpool informed Oreck that its distributorship would thereafter be restricted to only two Whirlpool products, one vacuum cleaner and one set of attachments to a different vacuum cleaner. Whirlpool insisted on extracting a further unfair condition, to wit, Whirlpool was willing to grant Oreck this drastically reduced extension of its distributorship only if Oreck executed a general release in favor of Whirlpool. No provision was made for the execution of any general release from Whirlpool to Oreck.

16. Whirlpool's great market power and position enabled it to coerce Oreck's agreement to these unconscionable terms. Whirlpool's offer constituted an ultimatum to Oreck to execute this restrictive agreement or lose its entire investment. Oreck had no alternative other than to accept the terms including the economically forced release, if it was to preserve the sales and service organization in which it had invested so much time, money and effort at the instance of Whirlpool.

17. Accordingly, on September 10, 1968 Oreck was forced to execute a letter agreement dated August 1, 1968 extending the distributorship on the greatly reduced basis described above and to execute the general release drafted by Whirlpool.

18. The restrictive provisions of the August 1, 1968 agreement unreasonably restrained trade and are void as against public policy, and the general release which Whirlpool forced Oreck to execute was void as coerced and against public policy.

19. The August 1, 1968 agreement extended the distributorship for the two Whirlpool products until December 31, 1971. In the Spring of 1971, again taking unfair advantage of its great market power and position, Whirlpool notified Oreck that it would not renew the distributorship beyond December 31, 1971. Whirlpool has refused to give any justification or cause for its failure to extend the distributorship. Whirlpool had previously assured Oreck on numerous occasions that the full distributorship would be continued indefinitely.

20. When Oreck sought to obtain only the barest means to continue its business, to wit, the right to purchase replacement parts from Whirlpool and to continue to supply service and such parts to its dealers for vacuum cleaners already in the possession of the public, Whirlpool was willing to supply parts for only one year and this only upon the execution of a general release by Oreck. Whirlpool has also refused to sell Oreck tools or drawings or other technical information to enable it to manufacture its own vacuum cleaners, has refused to furnish the names of its suppliers of components and has refused to grant relevant patent rights other than upon the execution of a general release. Oreck refused these unconscionable demands.

21. Whirlpool has also refused to make improvements and modifications in its vacuum cleaners and attachments as requested by Oreck, and has withheld such improvements and modifications from Oreck, with the intent and effect of foreclosing Oreck from

numerous customers and potential customers and reducing Oreck's competition with Sears, Roebuck.

22. On information and belief, Whirlpool and Sears, Roebuck have forced or persuaded one or more of their suppliers not to supply Oreck with components, and have engaged in a concerted program of harrassment and industrial spying upon Oreck.

23. On information and belief, the actions described herein were taken pursuant to a contract, combination or conspiracy in unreasonable restraint of interstate trade and commerce between Whirlpool and Sears, Roebuck.

24. In addition, the actions described herein were taken pursuant to a contract, combination or conspiracy in unreasonable restraint of interstate trade and commerce between Whirlpool and Oreck, in which Whirlpool by virtue of its great market power, position and dominance coerced Oreck into acting with it.

25. The purpose and effect of such contracts, combinations or conspiracies, and each of them, have been to deprive Oreck of its market for the sale of vacuum cleaners, attachments and parts under the Whirlpool name and label, and Oreck has substantially lost such market as a result of the actions referred to above.

26. The purpose and effect of such contracts, combinations or conspiracies, and each of them, have also been substantially to exclude Oreck from the market for vacuum cleaners, attachments and parts in the United States and its possessions, and to lessen competition in such market.

27. Such contracts, combinations, or conspiracies, and each of them, and the acts pursued in furtherance thereof, have directly and proximately injured Oreck's business or property in an amount of $5,000,000.

Second Claim

28. Paragraphs 1 through 24 are repeated and realleged.

29. During the term of Oreck's distributorship, Oreck sought to distribute Whirlpool vacuum cleaners in Canada. Exercising its great market power and dominant position in furtherance of and in addition to the aforesaid conspiracies and, on information and belief, in concert with Sears, Roebuck, Whirlpool expressly forbade Oreck to do so and otherwise prevented Oreck from doing so.

30. Such actions by Whirlpool and its co-conspirators constituted a combination or conspiracy in unreasonable restraint of interstate trade and commerce to prevent Oreck from selling vacuum cleaners and other Whirlpool products in Canada.

31. The purpose and effect of such combination or conspiracy have been to divide territories among competitors for the sale of vacuum cleaners, attachments and parts. By their actions the conspirators prevented Oreck from making sales beyond the limits of the territory to which Whirlpool confined Oreck.

32. Such combination, or conspiracy has directly and proximately injured Oreck's business or property in an amount which is believed to be substantial but which is unknown to Oreck at this time and must be determined in this action.

Third Claim

33. Paragraphs 1 through 24 are repeated and realleged.

34. During the term of Oreck's distributorship, Oreck sought to distribute Whirlpool vacuum cleaners and attachments to certain Whirlpool wholesale distributors and other customers or potential customers of Oreck in the United States. In furtherance of and in addition to the aforesaid conspiracies and, on information and belief, in concert with Sears, Roebuck, and exercising its great market power and dominant position, Whirlpool expressly forbade Oreck to do so, and otherwise conducted itself so as to prevent Oreck from doing so; and, on information and belief, Whirlpool and Sears, Roebuck forced or persuaded customers or potential customers of Oreck not to deal with Oreck.

35. Such actions by Whirlpool and its co-conspirators constitutued a combination or conspiracy in unreasonable restrain

of interstate trade and commerce, to allocate customers for vacuum cleaners to Oreck and foreclose competition from a substantial portion of the market.

36. The purpose and effect of such combination or conspiracy have been to divide customers among competitors for the sale of vacuum cleaners, attachments and parts. By their actions the conspirators prevented Oreck from making sales to customers and potential customers other than those to whom Whirlpool confined Oreck.

37. Such combination or conspiracy has directly and proximately injured Oreck's business or property in an amount which is believed to be substantial but which is unknown to Oreck at this time and must be determined in this action.

Fourth Claim

38. Paragraphs 1 through 24 are repeated and re-alleged.

39. Pursuant to such contract, combination or conspiracy, Whirlpool sold vacuum cleaners, attachments and parts to Sears, Roebuck at prices lower than the prices at which Whirlpool sold vacuum cleaners, attachments and parts at or about the same time to its own distributor Oreck.

40. Such sales of vacuum cleaners, attachments and parts to Sears, Roebuck at prices lower than the prices charged

to Oreck constituted acts of price discrimination between different purchasers of commodities of like grade and quality in and affecting interstate commerce, in violation of Section 2 of the Clayton Act as amended by the Robinson-Patman Act. 15 U.S.C. Section 13.

41. The effect of such price discrimination has been and may be substantially to lessen competition or tend to create a monopoly in the distribution of vacuum cleaners, attachments and parts, or to injure, destroy or prevent competition between Oreck and Sears, Roebuck or between customers of each of them. For example, such price discrimination has injured the competition of Oreck with Sears, Roebuck by allowing Sears, Roebuck to resell vacuum cleaners and attachments at prices which Oreck could not profitably meet and which were even below the prices at which Whirlpool sold such commodities to Oreck.

42. Such price discrimination, and the acts in furtherance thereof, have directly and proximately injured Oreck's business or property in an amount of $1,500,000.

Fifth Claim

43. Paragraphs 1 through 24 and 39 through 41 are repeated and realleged.

44. On information and belief, Sears, Roebuck while engaged in interstate commerce, and in the course of such commerce, knowingly induced or received such discriminations in

price in violation of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

45. Such inducement or reception of such discriminations has directly and proximately injured Oreck's business or property in an amount of $1,500,000.

Sixth Claim

46. Paragraphs 1 through 45 are repeated and realleged.

47. Oreck is being irreparably injured and is threatened with further loss or damage by the aforesaid acts of Whirlpool and Sears, Roebuck in violation of the antitrust laws, and has no adequate remedy at law.

Seventh Claim

48. Paragraphs 1 through 47 are repeated and realleged.

49. Sears, Roebuck has acquired directly or indirectly common stock and other share capital of Whirlpool, where in the manufacture and distribution of vacuum cleaners, attachments and parts in divers sections of the country and throughout the United States and its possessions, the continuing effect of such acquisition has been and may be substantially to lessen competition, or to tend to create a monopoly.

50. On information and belief, Sears, Roebuck is the largest holder of Whirlpool common stock and is a "control

person" of Whirlpool as that term is used under the Federal Securities Acts. Sears, Roebuck and Whirlpool have had a close relationship for over fifty years. For many years, Sears, Roebuck has purchased approximately two thirds of Whirlpool's entire production. For all or part of the relevant period their respective Boards of Directors have interlocked. Huge volumes of their business have been conducted on an informal basis, without underlying contracts, and they confer daily. Whirlpool is dependent upon the expansion of Sears, Roebuck for its own future growth. Whirlpool, in short, is a captive of Sears, Roebuck.

51. As a result of such acquisition by Sears, Roebuck, Oreck has been directly and proximately injured in its business or property in an amount which exceeds $6,500,000 but which is unknown to Oreck at this time and must be determined in this action, and in addition has been and continues to be irreparably injured.

WHEREFORE, Oreck respectfully demands judgment as follows:

(a) Treble $5,000,000 against Whirlpool and Sears, Roebuck, the amount of Oreck's damages with respect to the first claim, and

(b) Treble Oreck's damages with respect to the second, third and seventh claims against Whirlpool and Sears, Roebuck in amounts as shall be determined in this action, and

(c) Treble $1,500,000 against Whirlpool only,

the amount of Oreck's damages with respect to the forth claim, and

(d) Treble $1,500,000 against Sears, Roebuck only, the amount of Oreck's damages with respect to the fifth claim, and

(e) An injunction permanently enjoining Whirlpool and Sears, Roebuck and each of them and their respective successors, assigns, officers, employees, directors and agents from further doing the acts and violating the antitrust laws as alleged in the sixth claim, and

(f) An order that Sears, Roebuck forthwith divest itself of all stock and other share capital of Whirlpool held directly or indirectly by it, and

(g) A reasonable fee from defendants for plaintiff's attorneys, and

(h) Interest and the costs and disbursements of this action, and

(i) Such other and further relief as is just and proper.

New York, N. Y.
September , 1972

LAW FIRM OF MALCOLM A. HOFFMANN

By_____

A Member of the Firm
Attorneys for Plaintiff
12 East 41st Street
New York, N. Y. 10017
212 685-0535

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

ORECK CORPORATION, :

Plaintiff : 72 Civ. 3215 (M.E.F.)

-against- :

ANSWER

WHIRLPOOL CORPORATION and SEARS, ROEBUCK AND CO., INC. :

Defendants. :

- -x

Defendant WHIRLPOOL CORPORATION ("Whirlpool"), by its attorneys Stroock & Stroock & Lavan, for its answer to the amended complaint herein:

1. Denies the allegations contained in paragraph 1 of the amended complaint.

2. Denies the allegations contained in paragraph 2 of the amended complaint, except admits that plaintiff seeks to invoke this Court's jurisdiction under Section 4 of the Clayton Act.

3. Admits the allegations contained in paragraphs 3 and 4 of the amended complaint.

4. Denies having knowledge or information sufficient to form a belief with respect to the truth of the allegations contained in paragraph 5 of the amended complaint.

5. Denies having knowledge or information sufficient to form a belief with respect to the truth of the allegations contained in paragraph 6 of the amended complaint, except admits that Whirlpool resides, can be found and transacts business in the Southern District of New York.

6. Admits the allegations contained in paragraphs 7 and 8 of the amended complaint.

7. Denies the allegations contained in paragraph 9 of the amended complaint, except admits that Whirlpool began the sale and distribution of vacuum cleaners under its name and label in 1958 and discontinued the sale of such vacuum cleaners in 1961.

8. Denies the allegations contained in paragraph 10 of the amended complaint, except admits that Whirlpool executed a distributorship agreement dated August 7, 1963, whereby Oreck became the exclusive distributor of vacuum cleaners under Whirlpool's name.

9. Denies the allegations contained in paragraph 11 of the amended complaint, except admits that under the August 7, 1963 agreement, Oreck was to establish a dealer organization, to merchandise, and advertise Whirlpool products and to establish a national service organization with inventories of parts.

10. With respect to paragraph 12 of the amended complaint, denies that the other commodities referred to therein were manufactured in the State of Indiana and admits the remaining allegations contained therein.

11. Denies the allegations contained in paragraph 13 of the amended complaint, except that with respect to the allegations concerning the amounts of money, time or effort expended by Oreck in building up its distributorship organization, denies knowledge or information sufficient to form a belief with respect to the truth of said allegations.

12. Denies the allegations contained in paragraphs 14, 15, 16, 17 and 18 of the amended complaint.

13. Denies the allegations of paragraph 19 of the amended complaint, except admits that the August 1, 1968 agreement granted Oreck a distributorship for two Whirlpool products until December 31, 1971 and that Whirlpool in the Spring of 1971 notified Oreck that the distributorship created under the agreement of August 1, 1968, would not be extended or renewed.

14. Denies the allegations contained in paragraph 20 of the amended complaint, except admits that Whirlpool offered to supply parts to Oreck for a one year period if Oreck would execute a general release.

15. Denies the allegations contained in paragraphs 21, 22, 23, 24, 25, 26 and 27 of the amended complaint.

16. With respect to paragraph 28 of the amended complaint, incorporates by reference herein its answers to paragraphs 1 through 24 of the amended complaint.

17. Denies the allegations of paragraph 29 of the amended complaint, except that Oreck indicated its desire to distribute Whirlpool vacuum cleaners in Canada.

18. Denies the allegations contained in paragraphs 30, 31 and 32 of the amended complaint.

19. With respect to paragraph 33 of the amended complaint, incorporates by reference herein its answers to paragraphs 1 through 24 of the amended complaint.

20. Denies the allegations of paragraph 34 of the amended complaint, except denies knowledge or information sufficient to form a belief as to the allegation that Oreck sought to distribute Whirlpool vacuum cleaners and attachments to certain Whirlpool wholesale distributors and other customers or potential customers of Oreck in the United States.

21. Denies the allegations contained in paragraphs 35, 36 and 37 of the amended complaint.

22. With respect to paragraph 38 of the amended complaint, incorporates by reference herein its answers to paragraphs 1 through 24 of the amended complaint.

23. Denies the allegations contained in paragraphs 39, 40, 41 and 42 of the amended complaint.

24. With respect to paragraph 43 of the amended complaint, incorporates by reference herein its answers to paragraphs 1 through 24 and 39 through 41 of the amended complaint.

25. Denies the allegations contained in paragraph 44 of the amended complaint and further denies that Whirlpool discriminated.

26. Denies the allegations contained in paragraph 45 of the amended complaint.

27. With respect to paragraph 46 of the amended complaint, incorporates by reference herein its answers to paragraphs 1 through 45 of the amended complaint.

28. Denies the allegations contained in paragraph 47 of the amended complaint.

29. With respect to paragraph 48 of the amended complaint, incorporates by reference herein its answers to paragraphs 1 through 47 of the amended complaint.

30. Denies the allegations contained in paragraphs 49, 50 and 51 of the amended complaint.

AS AND FOR A FIRST
AFFIRMATIVE DEFENSE

31. The amended complaint and each claim thereof does not state a claim upon which relief can be granted.

AS AND FOR A SECOND
AFFIRMATIVE DEFENSE

32. The Court lacks jurisdiction of the subject matter of each claim contained in the amended complaint.

AS AND FOR A THIRD
AFFIRMATIVE DEFENSE

33. The amended complaint and each claim thereof is barred in whole or in part by the Statute of Limitations (15 U.S.C. §15b).

AS AND FOR A FOURTH
AFFIRMATIVE DEFENSE

34. All claims contained in the amended complaint purporting to have arisen and damages alleged to be sustained prior to August 1, 1968, were released and discharged by virtue of the agreement and release dated August 1, 1968.

AS AND FOR A FIFTH
AFFIRMATIVE DEFENSE
WITH RESPECT TO THE
FIFTH AND SIXTH CLAIMS
OF THE AMENDED COMPLAINT

35. The alleged price differentials, if any, referred to in paragraphs 39 through 45 of the amended complaint were:

A. Cost justified under the cost justification proviso of Section 2(a) of the Amended Clayton Act, 15 U.S.C. §13; and/or

B. Made in good faith to meet an equally low price of a competitor of Whirlpool in accordance with Section 2(b) of the Clayton Act, 15 U.S.C. §13.

WHEREFORE, defendant Whirlpool Corporation demands judgment dismissing the complaint as to it and for its costs and disbursements in this action, and for such other, further and different relief as the Court may deem just and proper.

Dated: New York, New York
September , 1972

STROOCK & STROOCK & LAVAN

By_____
A member of the firm
Attorneys for Whirlpool Corporation
61 Broadway
New York, New York 10006
212 - 425-5200

OF COUNSEL:

Burton Y. Weitzenfeld
Frank C. McAleer
Michael R. Turoff
120 S. LaSalle Street
Chicago, Illinois 60603

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORECK CORPORATION,	:	
Plaintiff,	:	1972 Civil Action No.
-against-	:	72 CIV 3215
WHIRLPOOL CORPORATION and SEARS, ROEBUCK AND CO., INC.,	:	(M.E.F.)
Defendants.	:	ANSWER

Defendant, SEARS, ROEBUCK AND CO. (Sears), by its attorney, NATHANIEL FENSTERSTOCK, for its answer to the amended complaint herein:

1. Denies the allegations contained in paragraph 1 of the amended complaint.

2. Denies the allegations contained in paragraph 2 of the amended complaint except that it admits that plaintiff seeks to invoke this Court's jurisdiction under Section 4 of the Clayton Act.

3. Denies having knowledge or information sufficient to formulate a belief with respect to the truth of the allegations contained in paragraph 3 of the amended complaint.

4. Admits the allegations of paragraphs 4 and 5 of the amended complaint.

5. Denies having knowledge or information sufficient to form a belief with respect to the truth of the allegations contained in paragraph 6 of the amended complaint except admits that Sears resides, can be found and transacts business in the Southern District of New York.

6. Admits the allegations contained in paragraphs 7 and 8 of the amended complaint.

7. Denies having knowledge or information sufficient to formulate a belief with respect to the truth of the allegations contained in paragraphs 9, 10, 11, 12 and 13 of the amended complaint.

8. Denies having knowledge or information sufficient to formulate a belief with respect to the truth of the allegations contained in paragraph 14 of the amended complaint concerning the success of Oreck in selling and distributing Whirlpool products. Denies the remaining allegations of paragraph 14 of the amended complaint.

9. Denies the allegations contained in paragraphs 15, 16, 17 and 18 of the amended complaint.

10. Denies having knowledge or information sufficient to formulate a belief with respect to the truth of the allegations contained in paragraphs 19 and 20 of the amended complaint.

11. Denies the allegations contained in paragraphs 21, 22, 23, 24, 25, 26 and 27 of the amended complaint.

12. With respect to paragraph 28 of the amended complaint, incorporates by reference herein its answers to paragraphs 1 through 24 of the amended complaint.

13. Denies the allegations of paragraphs 29, 30, 31 and 32 of the amended complaint.

14. With respect to paragraph 33 of the amended complaint, incorporates by reference herein its answers to paragraphs 1 through 24 of the amended complaint.

15. Denies the allegations contained in paragraphs 34, 35, 36 and 37 of the amended complaint.

16. With respect to paragraph 38 of the amended complaint, incorporates by reference herein its answers to paragraphs 1 through 24 of the amended complaint.

17. Denies having knowledge or information sufficient to form a belief with respect to the truth of the allegations contained in paragraph 39 of the amended complaint concerning the prices at which Whirlpool sold vacuum cleaners and attachments to plaintiff. Denies the remaining allegations of paragraph 39 of the amended complaint.

18. Denies having knowledge or information sufficient to form a belief with respect to the truth of the allegations contained in paragraph 40 of the amended complaint concerning the prices of vacuum cleaners which were sold by Whirlpool to plaintiff. Denies the remaining allegations of paragraph 40 of the amended complaint.

19. Denies the allegations contained in paragraphs 41 and 42 of the amended complaint.

20. With respect to paragraph 43 of the amended complaint, incorporates by reference herein its answers to paragraphs 1 through 24 and 39 through 41 of the amended complaint.

21. Denies the allegations contained in paragraphs 44 and 45 of the amended complaint.

22. With respect to paragraph 46 of the amended complaint, incorporates by reference herein its answers to paragraphs 1 through 45 of the amended complaint.

23. Denies the allegations contained in paragraph 47 of the amended complaint.

24. With respect to paragraph 48 of the amended complaint, incorporates by reference herein its answers to paragraphs 1 through 47 of the amended complaint.

25. Denies the allegations contained in paragraphs 49, 50 and 51 of the amended complaint.

AS AND FOR A FIRST
AFFIRMATIVE DEFENSE

26. The amended complaint and each claim thereof does not state a claim upon which relief can be granted.

AS AND FOR A SECOND
AFFIRMATIVE DEFENSE

27. The Court lacks jurisdiction of the subject matter in each claim thereof.

AS AND FOR A THIRD
AFFIRMATIVE DEFENSE

28. The complaint and each claim thereof is barred in whole or in part by the Statute of Limitations (15 U.S.C. 15b).

AS AND FOR A FOURTH
AFFIRMATIVE DEFENSE

29. Upon information and belief, Sears believes that all claims purporting to have arisen and damages alleged to be sustained prior to August 1, 1968 were released and discharged by virtue of the agreement and release of August 1, 1968.

AS AND FOR A FIFTH
AFFIRMATIVE DEFENSE
WITH RESPECT TO THE
FIFTH AND SIXTH CLAIMS
OF THE COMPLAINT

30. The alleged price differentials, if any, referred to in paragraphs 39 through 45 of the amended complaint were:

A. Cost justified under the cost justification proviso of Section 2(a) of the Amended Clayton Act, 15 U.S.C. §13; and/or

B. Made to meet in good faith an equally low price of a competitor of Whirlpool Corporation in accordance with Section 2(b) of the Clayton Act, 15 U.S.C. §13.

WHEREFORE, defendant Sears demands judgment dismissing the amended complaint as to it and for its costs and disbursements in this action, and for such other, further and different relief as the Court may deem just and proper.

Dated: New York, New York
September , 1972

NATHANIEL FENSTERSTOCK
Attorney for Sears, Roebuck and Co.
601 East 20th Street
New York, New York 10010

Of Counsel:

Arthur Medow
Sears, Roebuck and Co.
925 South Homan Avenue
Chicago, Illinois 60607

Secretary, Treasurer and a Director of Oreck.

Interrogatory 2. Identify each and every person, firm, corporation or other entity who, during any year, purchased one or more Whirlpool products from you, and with respect to each state:

(a) your gross annual sales;

(b) your gross annual profit;

(c) your net annual profit.

(In answering this Interrogatory and other Interrogatories calling for annual information, you may give the information requested either for the calendar or fiscal year, provided you specify which.)

Answer to Interrogatory 2. This Interrogatory, calling as it does for the particulars of over 240,000 sales of vacuum cleaners and attachments, not to mention sales of dust bags and parts, is burdensome and impossible to answer from Oreck's records, constitutes harassment, pries into trade secrets, and is objected to. We provide, however, information and explanation by way of partial answer, as well as further objections, as follows:

Oreck sales of Whirlpool products were in three categories:

a. Mail order sales - Oreck purchased mailing lists from list brokers who sell one address label for each prospect; Oreck covenanted not to reproduce this list and has not done so. The request to state the identity of each person on this list who has actually purchased a Whirlpool product directly from Oreck at retail is voluminous and burdensome to produce, not material, constitutes a trade secret and is objected to. Sales

and profit figures are approximately the same with respect to each unit sold regardless of the identification of the retail purchaser, and Oreck will make these records, kept in the ordinary course of business, available under Rule 33(c).

b. Sales to distributors and dealers - Oreck's position is the same as to these as it is as to mail order customers, except that Oreck does not here urge the objection of burdensomeness. The identity of Oreck's distributors and dealers is a particularly valuable trade secret in light of the fact that Oreck expended great sums of money to establish this organization, and the fact that Whirlpool has recently been whipsawing Oreck as follows: where Whirlpool has learned the identity of a dealer or distributor, Whirlpool has directed retail purchasers to it for repairs, but Whirlpool has still refused to supply Oreck with the necessary parts or compensation with which to meet the demand which such dealer or distributor makes upon Oreck as a result of making such repairs at Whirlpool's instigation during 1972.

c. Residual sales - These are sales of accessories, parts and vacuum bags to previous purchasers of vacuum cleaners and attachments. It is impossible to supply a complete list of these retail customers and would be very burdensome and serve no useful purpose to supply a partial list. In addition to objections of relevancy and burdensomeness, Oreck objects to identifying such customers, i.e., providing a customer list to its competitors, Whirlpool and Sears, on the grounds of trade secret. Selling vacuum cleaners is analogous to selling razors, in that the later sales of dust bags are like the later sales of razor blades. A major part of the profit is realized here. It would

be very helpful to Whirlpool and Sears, and correspondingly hurtful to Oreck, for them to obtain a free list of Oreck's dust-bag customers, in the guise of discovery.

Further answering Interrogatory No. 2, Oreck's gross annual sales, gross annual profit, and net annual profit (loss) are as follows:

Year*	Sales	Gross Profit (% of Sales)	Net Profit (Loss)
1963	$ -0-	-0-	($ 10,705)
1964	$ 136,022		$ 658
1965	$ 681,157	24.1	($ 75,706)
1966	$ 632,166	24.7	($ 29,303)
1967	$ 516,321	25.8	($ 29,860)
1968	$ 587,521	35.6	$ 26,248
1969	$1,195,868	35.2	$ 84,247
1970	$2,130,872	37	$ 79,682
1971	$4,771,608	35.5	$ 24,710
1971 (end)	$2,912,802	37.4	($128,416)

Oreck's figures in 1972 for the first five months after termination, as it used up its inventory of Whirlpool machines, were as follows:

	Sales	Gross Profit (% of Sales)	Net Profit (Loss)
Jan.	$326,605	36.5	($23,081)
Feb.	$256,376	38.9	($37,388)
Mar.	$241,506	41.4	$61,233
Apr.	$217,931	45.4	$44,965
May	$162,536	35.1	$24,742

The foregoing net annual profit (loss) figures do not include salaries which should have been drawn by principals but which were not. Such figures do not include any allowance for a fair return on invested capital; in this connection it is noted

*i.e., the Oreck fiscal year ending on June 30 of such year, except that (a) 1963 is a calendar year to November 30, 1963, (b) the 1964 figures include only December 1963 and the first six months of calendar 1964, and (c) the "1971 (end)" figures are for the last 6 months of calendar 1971.

that notwithstanding the multitude of impediments that Whirlpool placed in Oreck's path, the rate of Oreck's sales during the last [illegible] years of its franchise were (approx.): $600,000; $1,200,000; $2,100,000; $4,800,000; $5,000,000.

Insofar as this Interrogatory seeks additional evidence on the computation of damages, it is objected to as premature.

Interrogatory 3. Identify each and every person, firm, corporation or other entity from whom you purchased vacuum cleaners, attachments, components or parts other than from defendant and with respect to each product from each such supplier, state your total annual net dollar purchases and the type and quantity of each product purchased.

Answer to Interrogatory 3. As Whirlpool knows, Oreck has been obtaining its PT-57 canister from Mastercraft Industries, 420 Broadway, Newburgh, New York, since Whirlpool inexplicably stopped supplying Oreck with such canisters in 1968 following the March 1967 issue of the prestigious Consumer Reports, which featured this Whirlpool-Oreck canister on its cover and gave it the much coveted "check rating" in its evaluation of vacuum cleaners. The precise amounts of such canister purchases are objected to as a trade secret, although Whirlpool already knows, at least in numbers of units, the approximate amount of such purchases, since Whirlpool continued to sell Oreck the power attachments which go with the canister.

Specifically, Whirlpool was supplying Oreck with the V-150 canister and AP-18 power cleaning head which the young lady is demonstrating on the Xerox copy of the cover of the March 1967 Consumer Reports which is shown on the next page. Instead of cooperating with Oreck to reap the full benefits of this well-earned and highly favorable publicity, Whirlpool stopped supplying Oreck with these canisters by the time of the August 1, 1968 franchise extension, thus requiring Oreck to arrange with Mastercraft Industries to supply it with the PT-57 canister. Whirlpool, on the other hand, thereafter supplied Sears with a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF [illegible]

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Act (15 U.S.C. § 1) asserted in the third claim of the amended complaint and said third claim be dismissed with prejudice as to the plaintiff, said plaintiff through its counsel have withdrawn said third claim voluntarily before the Court on June 29, 1976 (Tr. 1327);

3. Defendants Whirlpool Corporation and Sears, Roebuck & Co., Inc. have judgment against plaintiff Oreck Corporation with respect to claimed violations of Section 16 of the Clayton Act (15 U.S.C. § 26) asserted in the sixth claim of the amended complaint and said sixth claim is dismissed with prejudice as to the plaintiff, said plaintiff through its counsel having withdrawn said sixth claim voluntarily before the Court on June 29, 1976 (Tr. 1327);

4. Defendants Whirlpool Corporation and Sears, Roebuck & Co., Inc. have judgment against plaintiff Oreck Corporation with respect to the claimed violations of Section 7 of the Clayton Act (15 U.S.C. § 18) asserted in the seventh claim of the amended complaint and said seventh claim is dismissed with prejudice as to the plaintiff, said plaintiff through its counsel having withdrawn said seventh claim voluntarily before the Court on June 29, 1976 (Tr. 1327);

5. Defendant Whirlpool Corporation have judgment against plaintiff Oreck Corporation with respect to claimed violations of Section 2 of the Clayton Act as amended by the Robinson-Patman Act (15 U.S.C. § 13) asserted in the fourth claim of the amended complaint is dismissed with prejudice as to plaintiff,

the Court [illegible] at the close of plaintiff's case that this claim [illegible];

6. [illegible] against plaintiff [illegible] violation [illegible] Robinson-Patman Act (15 U.S.C. § 13) [illegible] of the amended complaint is dismissed with prejudice [illegible] tiff, the Court having ruled at the close of plaintiff's case that this claim should be dismissed (Tr. 1372-73);

7. The Court shall retain jurisdiction over this action for purposes of determining, upon application, the amount of reasonable attorneys' fees and the costs of suit which may be appropriate for recovery against defendants Whirlpool Corporation and Sears, Roebuck & Co., Inc. under Section 4 of the Clayton Act (15 U.S.C. § 15) together with any other properly taxable costs, said costs to be recovered in one bill of costs. These amounts are to be assessed and entered at the foot of this judgment after disposition of the application therefor to be made to the Court on notice to defendants Whirlpool Corporation and Sears, Roebuck & Co., Inc.

Dated at New York, New York, this 13th day of July, 197[illegible]

Raymond F. Burghardt
Clerk of the Court

BEST COPY AVAILABLE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ORECK CORPORATION,

Plaintiff

-against-

72 Civ. 3215 (RO)

WHIRLPOOL CORPORATION and SEARS, ROEBUCK AND CO.,

Defendants

DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE FOR A NEW TRIAL

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Defendants, Whirlpool Corporation and Sears, Roebuck and Co., by their attorneys, move the Court pursuant to Rule 50(b) of the Federal Rules of Civil Procedure to set aside the verdict rendered on July 8, 1976, and for entry of judgment notwithstanding the verdict in favor of Whirlpool Corporation and Sears, Roebuck and Co., in accord with the motions for directed verdict made at the close of all the evidence and as to which the Court reserved decision.

In the alternative, defendants move for a new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure and, in support thereof, show unto the Court the following:

1. The verdict is contrary to law in that plaintiff failed to prove a prima facie case of liability under Count I or Count II as a matter of law.

2. The verdict is contrary to law in that the plaintiff failed to meet its burden of proving damages with a reasonable degree of certainty.

3. The verdict is grossly excessive and unreasonable and is not based on the evidence, but is the result of speculation, guess and conjecture.

4. The verdict is the result of passion and prejudice against these defendants.

5. The Court erred in admitting the Stroop report plaintiff's Exhibit 160, to the overwhelming prejudice of these defendants.

6. There is no competent evidence of damages to support the verdict.

7. The verdict is clearly erroneous and contrary to the weight of the evidence.

8. The Court erred in admitting the series of exhibits bearing number 106 and the series of exhibits bearing number 193 in that said exhibits were admitted without proper foundation and without regard to or credit for the actual number of vacuum cleaners, dust bags, parts, and accessories sold by plaintiff in the period January 1, 1972 through June, 1976.

9. The uncontradicted evidence shows that plaintiff was not excluded from the market for vacuum cleaners, parts or accessories in the United States or Canada as alleged by the plaintiff.

10. The record is devoid of any evidence of a contract, combination or conspiracy between Whirlpool and Sears as to Oreck.

11. The Court improperly commented on several occasions, prior to the close of plaintiff's case, as to deficiencies in plaintiff's case and as to the absence of any proof of a contract, combination or conspiracy between Whirlpool and Sears and thereafter improperly admitted highly questionable testimony concerning an alleged telephone conversation between Marshall Oreck and John Payne, which testimony was offered to correct the specific deficiencies previously noted by the Court, all to the overwhelming prejudice of defendants.

12. Alternatively, the alleged conversation of September 18, 1971, between Marshall Oreck and John Payne was improperly and prejudicially admitted because it is not evidence of a contract, combination or conspiracy as a matter of law inasmuch as the uncontradicted evidence shows:

(a) The alleged conversation occurred, if it occurred, more than three years after the 1968 agreement was negotiated and signed; and,

(b) The 1968 agreement (PX44) expired by its terms December 31, 1968; and,

(c) The alleged conversation occurred, if it occurred, approximately four months after it was formally announced that Whirlpool would permit

the 1968 agreement to expire according to its terms (PX96); and,

(d) Sears owned the tools needed to make the vacuum cleaners and could legally refuse to allow them to be used to make a product for a competitor such as Rex-Aire; and,

(e) The antitrust laws imposed no obligation on Whirlpool to make private label goods for Oreck; and,

(f) Any conspiracy between Whirlpool and Sears must, of necessity, have existed on or before August, 1968 and the alleged conversation of September 18, 1971, cannot relate back to that date as a matter of law.

13. The Court erred in its instructions to the jury concerning Whirlpool's purported liability under Count II pursuant to the Schwinn case.

14. The Court erred in its instructions to the jury concerning damages.

15. The Court erred in refusing to strike the testimony of Dr. Ritchin pursuant to defendants' motion.

16. The Court erred in refusing defendants' tendered jury instruction informing the jury that damages would be trebled.

17. The Court erred in admitting plaintiff's evidence concerning Whirlpool's disposition of inventory after December 31, 1971.

18. The Court erred in failing to direct a verdict for defendants pursuant to motions made at the close of plaintiff's evidence and at the close of all the evidence.

19. The Court erred in failing to grant defendants' motions for mistrial.

WHEREFORE, defendants pray for entry of judgment notwithstanding the verdict or, in the alternative, for a new trial. Pursuant to the order of this Court defendants will submit a memorandum in support of this motion on or

before August 26, 1976.

Michael R. Turoff
Patrick F. Geary

By: _____

Attorneys for Whirlpool Corporation
233 S. Wacker Drive
Chicago, Illinois 60606
(312) 876-7100

_____

Charles A. Tausche
Attorney for Sears, Roebuck and Co.
Sears Tower
Chicago, Illinois 60684

Certificate of Service

I certify I served this motion by mailing a copy certified, return receipt requested to Malcolm A. Hoffman at 12 East 41st Street, New York, N. Y., and depositing the same in the U. S. mail at 233 S. Wacker Drive, Chicago, Illinois 60606, before 5:00 p.m., on July 12, 1976, with proper postage prepaid.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ORECK CORPORATION,

Plaintiff

-against-

WHIRLPOOL CORPORATION and SEARS, ROEBUCK AND CO.,

Defendants

----------X

72 Civ. 3215 (RO)

DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE FOR A NEW TRIAL

MEMORANDUM

This motion is denied in all respects. The jury's verdict has sufficient support in the record and may not be set aside. Lehrer v. Bethlehem Steel Co., 402 F.2d 585, 589 (2d Cir. 1968).

So ordered

1/7/76

Robert Ellis
USDJ

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORECK CORPORATION,

Plaintiff,

-against-

WHIRLPOOL CORPORATION and SEARS, ROEBUCK AND CO., INC.,

Defendants.

72 Civ. 3215 (RC)

COUNTER-JUDGMENT

This cause having duly come on to be heard before the Honorable Richard Owen, District Judge, on application of plaintiff Oreck Corporation for the cost of suit, including a reasonable attorney's fee, pursuant to 15 U.S.C. §15, and the judgment in this action having been entered on July 13, 1976, and the Court, having considered the matter submitted by counsel, being fully satisfied and having filed its opinion disposing of said application on December 9, 1976, it is

ORDERED, that plaintiff Oreck Corporation have judgment against defendants Whirlpool Corporation and Sears, Roebuck and Co., Inc. for an attorney's fee pursuant to 15 U.S.C. §15, in the amount of $125,000.00, and it is further

ORDERED, that plaintiff Oreck Corporation have judgment

against said defendants for the other costs of suit pursuant to 15 U.S.C. §15 in the amount of $5,000.00, which amount shall be in addition to the amount of the attorney's fee awarded above and shall consist of the following two (2) items of allowed costs:

1. Pretrial depositions $4,000.00

2. Reproduction of Depositions and Exhibits $1,000.00

and it is further,

ORDERED, that a Judgment in the amounts of $125,000.00 for a reasonable attorney's fee and $5,000.00 for the other costs of suit be entered by the Clerk of the Court.

11/6/77

U.S.D.J.

JUDGMENT ENTERED — 11/10/77
Richard J. Arcara
CLERK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORECK CORPORATION,

Plaintiff,

-against-

WHIRLPOOL CORPORATION and SEARS, ROEBUCK AND CO.,

Defendants.

72 Civ. 3215 (RO)

NOTICE OF APPEAL

PLEASE TAKE NOTICE that defendants Whirlpool Corporation and Sears Roebuck and Co. hereby appeal to the United States Court of Appeals for the Second Circuit from (i) the final judgment entered against them in this action on July 13, 1976, (ii) the Order entered on December 7, 1976, denying defendants' post-trial motions for judgment notwithstanding the verdict or, in the alternative, for a new trial, and (iii) any judgment awarding plaintiff legal fees and costs pursuant to the Memorandum Decision dated December 9, 1976.

Dated: December 14, 1976

ARNSTEIN, GLUCK, WEITZENFELD & MINOW
75th Floor - Sears Tower
Chicago, Illinois 60606

STROOCK & STROOCK & LAVAN
61 Broadway
New York, New York 10006

By: _____

Attorneys for Defendant
Whirlpool Corporation

CHARLES A. TAUSCHE, ESQ.
Sears Tower
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- and -

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1633 Broadway
New York, New York 10019

By: _____

Attorneys for Defendant
Sears Roebuck and Co.

TO:

LAW OFFICES OF MALCOLM A. HOFFMANN
Attorneys for Plaintiff
12 East 41st Street
New York, New York

* * *

Q Sir, when was the Orect Corporation formed?

A It was formed in mid-1963.

Q For what purpose was it formed?

A It was formed to sell nationally marketed RCA Whirlpool vacuum cleaners.

Q Can you tell me when the idea of forming such a corporation was first evolved?

A Yes, sir. I received a phone call around the 1st of April, 1963, from Jack Sparks, who was the group vice-president of the Whirlpool Corporation and he advised me that he was coming to New York on April 10 and he would like to meet with me at his hotel, the Americana Hotel, he had a proposition for me.

Q This is the moment in time when the idea of the Oreck Corporation was formulated? Is that what you are saying?

A Yes, sir.

Q If I may take you away from that, can you tell

us, please, briefly what your employment experience had been prior to that time?

A Yes, sir. After I got out of the Air Force I moved to New York City, in July of 1946, and I was shortly thereafter employed by Bruno, New York on the order desk.

I moved up from the order desk to sales, calling on key department stores, key stores around New York City, selling principally television and appliances. I subsequently became assistant sales manager. I ultimately became the general sales manager of the company, and later was named as a vice-president of the company.

2 Q About what time did you become vice-president?

A I would guess it was in 1952 or thereabouts.

Q Tell us in general what your duties were at Bruno, New York? You say you were on the order desk. followed by being a salesman. What were your duties as a salesman?

A Well, sir, I think I should say that Bruno, New York, is a company located here in New York City in the distribution business. They are distributors for RCA and for Whirlpool, as they were much at that time, and my responsibilities were to supervise all of the managers, the various sales managers of the company. At that time the company was also selling phonographic records, and all

these various managers reported to me. They had salesmen under them, and they went out and solicited business from retail dealers throughout the city.

Q Can you say about how many persons were under your supervision when you were general manager for Bruno, New York?

A I would guess overall there must have been, between managers and salesmen and the like, some 75 people.

* * *

* * *

Q During the course of the time that you were in your function as general manager and made a vice-president in charge of sales at Bruno, New York, did you have any contact with representatives of the Whirlpool Corporation?

A Yes, sir, I did.

* * *

Q Tell us, please, Mr. Oreck, when you first made, if you did, any business arrangements between Bruno, New York and the Whirlpool Corporation?

A I believe it was in 1955.

Q In connection with what products?

A It was in connection with Whirlpool washing machines and driers, initially.

Q Did there come a time when you made arrangements

on behalf of Bruno with Whirlpool in connection with the sale of vacuum cleaners?

A Yes.

Q When was that?

A That was in 1958.

Q Can you tell us what it was that you representing Bruno undertook to do in connection with the sale of vacuum cleaners of Whirlpool?

* * *

A Whirlpool was brand new in the vacuum cleaner business, although I was not, because my company had sole Eureka vacuum cleaners some years prior. I undertook to get and train a sales organization, to set up a dealer organization, to develop and prepare advertisements of this product, to have demonstrators set up in stores and what-not, and then to sell the product -- in short, everything to do with the marketing of the product was my responsibility.

Q Can you remember the names of the Whirlpool officers or representatives with whom you had contact in connection with the sale of the Whirlpool vacuum cleaner?

A Yes, sir. There was an Elisha Gray, who was then president of the company; Jack Sparks, who was the vice-president of the company; Mr. George Stevens, who was, I believe, at that time head of the vacuum cleaner division for Whirlpool.

Q And when did Oreck first begin to distribute Whirlpool vacuum cleaners?

A We began to distribute some time in 1958 when Whirlpool had them ready.

Q Did you have any knowledge at that time of what other distributors there were for vacuum cleaners made by Whirlpool?

A Yes, sir, all of the Whirlpool distributors in the various parts of the country had the Whirlpool vacuum cleaner line.

Q Do you have any idea of the number?

MR. TUROFF: I would object if he is going to estimate and I don't see where it goes. We will stipulate Bruno sold vacuum cleaners.

THE COURT: I am not aware of the relevance.

MR. HOFFMANN: Your Honor, I mean to offer proof that there were a large number of distributors and that they were unsuccessful in their operation, but this was not the case with Bruno, New York, which was headed by

David Oreck.

MR. TUROFF: I will stipulate to that, your Honor.

MR. HOFFMANN: Whether he stipulates or not, I think I have a right to prove it through .the witness.

THE COURT: You can do it, if you do it in a competent manner.

MR. HOFFMANN: I will accept the stipulation.

I propose the content of the stipulation, if I may, and that is that there were many distributors for the Whirlpool made vacuum cleaner during the years 1958 to 1961 and the most successful was Bruno, New York, which was headed by Mr. Oreck in conn ction with vacuum cleaner sales.

MR. TUROFF: I will stipulate to that, your Honor.

* * *

- -

Mr. Oreck, what were your marketing methods you used in selling?

THE WITNESS: We treated vacuum cleaners as a specialty product business. We trained salesmen specifically to sell vacuum cleaners. We demonstrated vacuum cleaners. I think that our success was the fact that we did not present like a major appliance and we did not treat them like a toaster appliance. We treated them as a specialty product, a specialty business, and with those efforts we were able to get approximately 5.4 per cent of the industry, which was two and a half times greater than Whirlpool's national percentage.

Q Mr. Oreck, you described earlier in your testimony the time when the idea was conceived of to form the Oreck Corporation, but I am going to ask you, please, to describe the conversation which you had with Mr.Sparks at that time which you said in your testimony was April, 1963.

Tell us, first, where the conversation took place.

A The conversation took place at the Americana Hotel.

Q And who was present during the conversation?

A Jack Sparks and myself.

Q And can you tell us as best you can recall what was said, what passed between you?

A Yes, sir.

MR. TUROFF: Pardon me, can we have a date for that conversation?

THE COURT: I thought it was established as --

THE WITNESS: April 10th.

MR. HOFFMAN: It was already established as April.

THE COURT: April, '63?

THE WITNESS: Yes.

MR. TUROFF: Thank you, your Honor.

THE COURT: All right. Go ahead.

A Mr. Sparks told me that he came at the suggestion of Elisha Gray. Elisha Gray was the president of the Whirlpool Corporation. He told me that Whirlpool had been, as I knew, of course, very unsuccessful in the vacuum cleaner business; that they had an enormous investment in the business in tools and dies, and what not. They felt that it was a growing industry. At that time the industry was doing around 3 million units per year. They were manufacturing vacuum cleaners for Sears, Roebuck and they felt that if I applied the same techniques that I had used locally in New York that I would be successful for them

nationally, and they urged me to set up a company to act as the marketing arm for Whirlpool on vacuum cleaners.

He said that that would mean that I would develop the line as to its design and features, that I would establish the advertising; that I would set up the dealers and the distribution methods nationally; that I would be solely responsible for the sales all over the United States and its possessions; that they would give me an exclusive contract with what to do that; that I would have the benefit of not only the sales of the product, but the replacement parts that went with it, which is an ongoing business and which is a very important part of the business.

* * *

* * *

A (Continuing) Mr. Sparks said that they would -- this was an unusual contract; that they had never done this before, that is to say, to give me or anyone the total market responsibility for a part of their line and that they would give me a contract that will cover all this, and this contract would go on indefinitely.

I pointed out to him at that meeting that I would be rushing in where angels fear to tread because they had not been successful doing that and he encouraged me to undertake this on the grounds that if I could do as well nationally as I had done locally in New York, which is a very competitive market, that he felt that I could make a success of this thing, it would be meaningful to Whirlpool and he felt it would be very meaningful to him.

That was the essence of that discussion.

Did you have any further conversations with representatives of Whirlpool at or about that time concerning setting up of the Oreck Corporation?

A Well, following our initial meeting I had

discussions with Whirlpool people, with Mr. Sparks again on the phone, and ultimately a visit to Whirlpool's headquarters in Michigan I believe about 30 days after our original meeting.

* * *

Q Mr. Oreck, I show you what has been marked as Plaintiff's Exhibit 11 for identification and ask if this is a document with which you are familiar?

A (Examining) Yes, sir.

Q Will you notice,please,that it consists of two pages and on the second page there is a heading, "Needed planning program, Oreck Vacuum Cleaner." Do you see that?

A Yes, sir.

Q Do you notice any claims listed at the bottom of the second page?

A Yes, I do.

Q Is yours included there?

A Yes, it is.

Q Do you have any recollection of having received this document about the time it states, which is June 14, 1963?

A I recall the letter.

* * *

xx

(Plaintiff's Exhibit 11 received in evidence.)

* * *

Q Mr. Oreck, please take a look at Exhibit 11. I address your attention to the third paragraph of the letter. Do you see that?

A Yes, sir.

Q Would you be kind enough to read it aloud?

A "Retail pricing would range from $39 to $179, emphasizing specialty selling through department stores."

Q Do you know what that refers to?

A Yes, sir.

Q What?

A It is referring to the retail price of vacuum

cleaners, and he is suggesting that they be sold --

MR. TUROFF: I am going to object to his interpretations.

THE COURT: Sustained. The letter speaks for itself.

Q Well, sir, in respect to the vacuum cleaners as to which the statement is made "Retail pricing would range from $39 to $179, emphasizing specialty selling through department stores." Were you told by Whirlpool representatives on or about June 14, 1963, that you would be expected to sell vacuum cleaners within that price range."

MR. TUROFF: I object to the form of the question as leading.

THE COURT: Yes. On the other hand, I suppose it is a problem on how to focus on a specific item.

Did you have a conversation with anybody at Whirlpool on that subject?

THE WITNESS: Yes, I did.

THE COURT: Whom did you talk to? Where did you talk to them? And what did each of you say? And when?

THE WITNESS: I had talked to Mr. Sparks on the subject; it was discussed in the presence of Mr. Gray, as

well as I recall it. It related in general to the pricing points that we hoped to --

MR. TUROFF: Pardon me. Could we first have a foundation?

THE COURT: Is that what Mr. Sparks was saying to you?

THE WITNESS: Yes, sir.

THE COURT: Tell us what Mr. Sparks said?

MR. TUROFF: May we have the time?

THE COURT: When did this take place?

THE WITNESS: This took place on or about June 14. this letter was June 14, 1963, it was in the same general period, my original meeting having been with Mr. Sparks having been on April 10. So it was between April 10 and this period.

MR. TUROFF: Can we have a place?

THE COURT: Where did this conversation take place?

THE WITNESS: In New York, in Benton Harbor and in St. Paul, Minnesota.

MR. TUROFF: Are we having one conversation or three conversations?

THE COURT: You are getting the synthesis of three conversations.

You may continue.

THE WITNESS: We had to design or arrive at certain models to be produced. They were not at this time. And in order to arrive at what models had to be produced we had at what price points they were going to sell at, wanted to sell at. So first we had to arrive at these price points, and then we would determine by talking to the manufacturing people what kind of a product could be produced to sell at these price points.

Q Mr. Oreck, would you please look closely at this letter. You notice it is from J. F. Bourquin to Mr. S. J. Smith, vice-president, Whirlpool Corporation, Administrative Center, Benton Harbor, Michigan, and it is dated June 14, 1963.

Did you know who Mr. Bourquin was?

A Mr. Bourquin was the head of the plant at St. Paul, Minnesota.

Q S. J. Smith, what was his function in Whirlpool, if you know?

A I don't recall him at this time.

Q In any case, he is described here as vice-preside Whirlpool Corporation, Administrative Center?

A Yes, sir.

Q And the subject matter is RCA-Whirlpool Vacuum

Cleaner Program. The first paragraph states:

"Dave Oreck was here on Tuesday and Wednesday of this week with Jack Sparks, to further review the planning necessary for him to set up a distribution company handling floor care equipment."

Does that paragraph serve in any way to sharpen your mind as to the time when the conversation took place which you mentioned in answer to the Judge's questions?

A Yes, sir. I met in St. Paul about this time, a little prior to this, I believe, in early June, with Mr. Bourquin and with Mr. Sparks. I had flown from New York to Benton Harbor. I met Mr. Sparks, talked with him there, I believe, on Sunday and Monday, and the following day, to coincide with this Tuesday, and Wednesday we went to St Paul I think we went in a company plane, but I am not certain of that. I went with Mr. Sparks to St. Paul, and we met with Mr. Bourquin.

Q Would you be good enough to read the next paragraph aloud?

A "His present intentions revolve around use of the former F-90 Whirlpool canister using the asymmetrical Power Mate attachments developed with Paul Schulz for Sears' slant panel line. Both of these items would completely avoid any aesthetics clash

with the present Sears production."

Q Sir, can you tell us what the former F-90 Whirlpool canister using the asymmetrical Power Mate attachments was?

A We did, in fact, use that model.

Q They were sold to you by Whirlpool?

A They were sold to me by Whirlpool under the model designation V-150-AP-18.

Q Do you know what the Sears slant panel line was as referred to in this letter?

A I recall it to be a canister, a line of canister vacuum cleaners that had a slant front to it.

* * *

* * *

(Mr. Hoffmann continued to read from Plaintiff's Exhibit 11 in evidence.)

BY MR. HOFFMANN:

Q Now, sir, these meetings you described in answer to the Judge's questions taking place in 1963 and taking place in St. Paul also, what was the purpose of those meetings?

A The purpose of the meetings were two-fold:

One, further discussion of the franchise terms, and, second, as to the products, the dates, the costs and everything related to that.

Q Was this, in effect, planning the vacuum cleaners that Whirlpool would make and sell to Oreck?

A Yes, sir.

Q Can you tell us from your long experience and knowledge in the distribution of home appliances whether or not this is a usual practice of the manufacturer, to sit down and meet with his customers in order to consider the product which would be made and sold?

* * *

* * *

A This is not customary. In fact, it is unique. The normal relationship --

* * *

A (Continuing) The relationship between the manufacturer and a distributor, wholesale distributor is that the manufacturer designs his line, he does all the pricing of it, prepares the advertising literature, prepares the service information and the schematics, and all things related to it, gets underwriter laboratory approval, handles the packaging, and comes to the wholesale distributor with the complete package and says, "This is what I have to give

you and which you can resell."

* * *

THE WITNESS: In these meetings I was instrumental in the design of the product, of its packaging, things relating to the service of the product, its advertising, its delivery, even the carton. These things that

* * *

Q Was anyone else, Mr. Oreck, who was under the plans being discussed to market vacuum cleaners made by Whirlpool other than Sears Roebuck and the Oreck Corporation?

* * *

A No one else was dealing with Whirlpool on vacuum cleaners, with the exception of Sears and myself.

Q Now, addressing your attention to the second paragraph, Plaintiff's Exhibit 11 in evidence:

"His present intentions revolve around use of former U-90 Whirlpool canister using the assymetrical Power Mate attachments developed with Paul Schulz for Sears' slant panel line. Both of these items

would completely avoid any aesthetics clash with the present Sears production."

Was anything said to you during these plan conferences concerning that subject, that is to say, the avoidance of any aesthetic clash with the present Sears production?

A Yes.

Q What was that, sir?

A Mr. Sparks advised me that we were not to conflict with the Sears line aesthetically or any other way.

MR. TUROFF: I am going to move to strike. There is no foundation for this conversation, when it is, where it is.

THE COURT: Let us establish that. I take it this is somewhere in the April to June, 1963, period with Mr. Sparks somewhere? Is that right?

THE WITNESS: Yes.

THE COURT: Can you tell us where?

THE WITNESS: Yes, your Honor. I met with Mr. Sparks in Benton Harbor, Michigan in early June, I would guess around the 8th or 10th of June in 1963, and at that time the ground rules were set forth for me relative to my selling the Whirlpool vacuum cleaner line. This conversation did take place at that time and subse-

quently.

Q Will you address yourself, Mr. Oreck, to the first paragraph of Plaintiff's Exhibit 11, which you note is dated June 14, 1963. You will see it says:

"Dave Oreck was here on Tuesday and Wednesday of this week with Jack Sparks, to further review the planning necessary for him to set up a distribution company."

Does what I have read to you serve in any way to sharpen your recollection as to the date when your conversation that you just described having to do with aesthetics took place?

A I would have to look in my calendar of that year, but it was on Sunday and Monday preceding this Tuesday and Wednesday, the letter being dated June 4, 1963. Whether that is a Thursday or not, but it was back up a few days from there. I presume this letter was written a day or so after our visit.

Q Do you have any recollection whether or not during the conversation just described other subject matters having to do with Sears were discussed.

* * *

* * *

A We were advsed -- I was advised by Mr. Sparks that I was not to conflict with Sears on low price points; I was to sell high price merchandise and Sears would sell the low price and I was advised that we would have a product that looked different from theirs. I was told that I was simply not to conflict with Sears Roebuck on price, appearance, any thing like that.

(Continued on next page.)

T3 Q I would like to show the witness what has been marked as Plaintiff's Exhibit 13 for identification and ask if he can identify it for us.

A Yes, sir.

Q Mr. Oreck, can you tell us what Plaintiff's Exhibit 13 for identification is?

A This is a copy of the press release that was sent out by Whirlpool in August of 1963 to all trade papers and to other publications. It also was sent out to all of the Whirlpool distributors at that time.

Q Did you have anything to do with the preparation of this press release, Mr. Oreck?

A Mr. Sparks did counsel with me about the contents of that release before he went it out, yes, sir, although it was prepared by Whirlpool, but he did tell me the contents of it.

MR. HOFFMAN: I offer it in evidence, your Honor.

THE COURT: Is there any objection?

MR. TUROFF: Only on relevancy, your Honor.

THE COURT: All right. Overruled.

xx (Plaintiff's Exhibit 13 received in evidence.)

* * *

* * *

(Mr. Hoffman read from Plaintiff's Exhibit 13 in evidence.).

* * *

(Mr. Hoffman continued reading from Plaintiff's Exhibit 13 in evidence.)

Q Do you notice, Mr. Oreck, the word "franchise" in the first paragraph which I have just read, "Whirlpool announced today it has granted Oreck Corporation, a newly formed specialty sales company, a franchise for national sales and distribution of RCA Whirlpool vacuum cleaners"? Do you see that, sir?

A Yes, sir.

Q Is that a word which in these conversations he just described Whirlpool representatives used in referring to your rights to distribute Whirlpool vacuum cleaners?

A Yes, sir.

Q Now, sir, do you see the phrase "national sales and distribution" a little further down?

A (Examining) Where is that, sir?

Q Mr. Oreck, I am going to apologize both to the Court, the jury and my opponent for taking so much time, but my eye had lost the place. It is right up at the very top, "a franchise for the national sales and distribution of RCA Whirlpool vacuum cleaners."

A Yes, sir, I see that.

* * *

* * *

Q Do you know, sir, of any Whirlpool distributor that was given a national sales and distribution franchise?

A No, sir.

Q And when you say "No, sir," to my question, do you mean "No, I do not know," or do you mean, "No, no such franchise was given"?

A No such franchise was given to any other distributor.

* * *

* * *

Q This is again a reference to the agreement, which is -- I am sorry, the press release, which is Exhibit 11 in evidence:

"We know we have the tools, facilities and knowhow to produce a superior vacuum cleaner at competitive

prices. We feel that this agreement with Oreck Corporation will revitalize the RCA-Whirlpool vacuum cleaner business and strengthen the general acceptance of the brand name RCA-Whirlpool throughout Whirlpool's full line of home appliances."

This press release makes reference, Mr. Oreck, to the RCA-Whirlpool vacuum cleaner business rather than just Whirlpool. Can you explain why RCA is to be found together with Whirlpool in this contract?

A RCA made an arrangement with the Whirlpool Corporation around 1955 whereby for certain considerations Whirlpool could use the RCA name. This was withdrawn by RCA about ten years later because it caused considerable--

MR. TUROFF: Objection, your Honor, to the "because." We will stipulate there was an agreement to license.

* * *

* * *

MR. HOFFMAN: Your Honor, I must apologize. I didn't hear the whole thing.

I am now going to offer in evidence as Plaintiff's Exhibit 3 something that has been marked as 3 for identification, a letter agreement under date August 7, 1963, signed by Jack Sparks for the Whirlpool Corporation and by David Oreck for the Oreck Corporation. And I take it as to that surely there is no objection.

* * *

xx (Plaintiff's Exhibit 3 received in evidence.)

* * *

* * *

MR. HOFFMAN: With your Honor's consent, I would like to read the first paragraph of what has been identified as the franchise agreement to Oreck Corporation of August 7, 1963, Plaintiff's Exhibit 3.

(Mr. Hoffman read from Plaintiff's Exhibit 3 in evidence.)

* * *

Q Sir, did you prior to entering into this agreement of August 7, 1963, invest any money in the Oreck Corporation?

A Yes, I did.

Q And did you devote time to it as well?

A Yes, I did. We had an oral agreement --

* * *

* * *

Q Can you tell us how much of your own money you put into the Oreck franchise?

* * *

A Of my own and my family's money over $150,000.

Q Now, you had conversations with Mr. Sparks prior to signing this agreement which you described in your testimony earlier. Was there any conversation with Mr. Sparks having to do with your making investments or devoting to this Oreck Corporation to be formed?

A Yes, there were discussions.

* * *

* * *

MR.HOFFMAN: Your Honor, with your consent I would like to read to the jury paragraph 7 of this franchise agreement of August 7, 1976.

THE COURT: Very good.

(Mr. Hoffman read from Plaintiff's Exhibit 3 in evidence.)

BY MR. HOFFMAN:

Q Mr. Oreck, the reference is made here in the matter I have just read to the demands of other Whirlpool customers. Did you know of any other Whirlpool customers for vacuum cleaners as of August 7, 1963?

A Yes, Sears, Roebuck.

Q Any others?

A There were no others.

MR. HOFFMAN: With your Honor's consent, I would like to read paragraph 2 of this agreement.

THE COURT: All right.

(Mr. Hoffman read from Plaintiff's Exhibit 3 in evidence.)

* * *

* * *

Q Mr. Oreck, in the first part of paragraph 2, reference is made to authorizing Whirlpool to distribute RCA-Whirlpool home vacuum cleaners of the portable type powered during use by connection to an ordinary 110-volt household electrical circuit.

Can you tell us what makes and types of vacuum cleaners that refers?

* * *

* * *

A Basically you have upright vacuum cleaners to clean the rug with that usually have revolving brushes.

You have cannister-type vacuum cleaners which usually are just suction cleaners set on the floor and there are variations of the cannister sometimes used with a motor-driven attachment that revolves on the rug in conjunction with the cannister.

And the third category, which would be excluded here, would be central vacuum --

MR. TUROFF: I think Mr. Oreck would be excluded from telling us that.

THE COURT: This is not covered.

THE WITNESS: That is correct, this is not covered.

THE COURT: This is a home vacuum cleaner?

THE WITNESS: Yes, sir.

wp16 Oreck-direct

THE COURT: Tell us about the one that is excluded and why it isn't within this language.

MR. TUROFF: Your Honor, it says portable, I believe.

THE COURT: Mr. Oreck?

THE WITNESS: Your Honor, I was referring to the central vacuum cleaner and that type of vacuum cleaner is the kind that is generally installed permanently within the house at outlets at various points.

THE COURT: I see; all right.

What you are saying is portable includes the type that has the handle and bag and also includes the cannister, those are the two types you are talking about?

THE WITNESS: Yes.

T4 pm ms Oreck - direct 52

MR. HOFFMANN: Mr. Hoffmann, we have these vacuum cleaners in the neighboring room, and I am wondering whether I may have your consent to have them brought forward now so the witness may identify them?

THE COURT: Yes.

MR. HOFFMANN: May I have your sent to have the witness leave the stand and come forward and describe these?

THE COURT: Yes, let us have a tag on them.

(Plaintiff's Exhibits 5, 6, 7 and 8 were marked for identification.)

xx THE COURT: Mr. Oreck, you may step down and tell us about these.

Q Please identify this Exhibit 5 for identification?

A This is an upright vacuum cleaner, the bag in front with a high speed revolving brush operating on the floor.

Q What logo or name does it bear?

A This bears the name Whirlpool brand.

Q Is that the brand sold under your contract by you?

A Yes, this is the brand sold by me and has our name on the back of it, Oreck Corporation.

Q Perhaps you might hold it a little closer to the jury.

MR. TUROFF: Perhaps the witness might clarify the time during which that was sold.

Q These letters in front, CBR-2000?

A That is the model number that we gave the unit for our own identification.

Q When you say "you"?

A The Oreck Corporation designated this Model CBR-2000.

Q And in the same area where it says CBR-2000, it also says "High Speed Upright"?

A Yes, sir, and Whirlpool.

Q Was that all part of the designation which you gave to it, you, Oreck, gave to it?

A Yes, sir.

Q And did you have Whirlpool's consent in doing that?

A Yes.

Q Tell us, please, what you know about Exhibit 6 for identification?

A This is the high speed upright model Sears unit with the same brush down below and working on the same principle exactly as this one. They are the same.

MR. TUROFF: Objection to that, your Honor, and I move to strike, "They are the same." I think that is a conclusion that there is not yet sufficient foundation for.

MR. HOFFMANN: If there is an expert in the field, it is Mr. Oreck.

THE COURT: When you say they are the same, what do you mean?

THE WITNESS: The way that this vacuum works is unique. In conventional cleaners the dirt enters at the bottom of the bag. In this cleaner the dirt goes up the handle and drops to the bottom of the bag. So there is a little difference in the way it works. This unit operates exactly the same way. If the bag were removed, you would find the dirt goes up the handles and drops to the bottom. The mechanism inside of this machine is precisely the same as this one, the same motor; this casting is the same; the same bumper; it is, aside from the apparent aesthetic differences, color, what-not, the mechanism and the way it works and everything else is the same in my opinion.

Q Tell us, please, what is this machine marked 7 for identification?

A This is a motorized upright unit that works in conjunction with the canister cleaner. It has no suction,

ms Oreck - direct

but does thave a motor that drives a revolving brush, and the current is brought down this conduit here to the motor, which is in here. This is our model, Oreck's Model AP-13 Whirlpool and it is used in conjunction with a canister cleaner. So by providing the suction here and electrical current to drive this brush, you have a two-motor vacuum cleaner.

Q Finally, this machine marked 8 for identification?

A This is a canister vacuum cleaner which can be used either in conjunction with that motorized attachment or can be used with just conventional cleaning tools; the canister has a motor inside that raises suction; it has an elctrical outlet at the base here, which is where we get our current to take down to that motorized attachment. So this is the canister suction unit here, and this works in conjunction with this, and it is then a two-motor vacuum cleaner.

MR. HOFFMANN: I offer in evidence the four vacuum cleaner machines, Exhibits 5, 6, 7 and 8.

* * *

(Plaintiff's Exhibits 5, 6, 7 and 8 were received in evidence.)

* * *

Q Mr. Oreck, when Oreck Corporation first got started, where was it located? Where was it doing business?

A Doing business from No. 1 Rockefeller Plaza.

Q What did you do to try to sell the vacuum cleaner in volume when you were first getting started?

A I personally traveled throughout the United States, visited every major city, visited every major department store, and set them up, sold them the vacuum cleaners. In New York City, for example, I visited every department store, every major department store that handled vacuum cleaners. This was true in Boston and Chicago and San Francisco and Los Angeles and Dallas and Houston and so on. I personally went out and set them up, and after I did that, I set up service agents in all of these various cities to follow up to be able to handle service for us. I engaged salesmen, representatives to solicit these accounts. I engaged a man to handle the advertising for these accounts. I hired on many

occasions demonstrators or women to work in these stores to demonstrate these units; I printed up the service literature, the schematics, the drawings, everything related to the repair, and set up parts depots around the country.

In many cases, the parts were stocked by the same people who rendered service, though not in every case, and, of course, we followed up with regular mailings, shipping, sales training, everything that you have to do to try to get a product going.

Q You say that you set up local arrangements for servicing the vacuum cleaners. Were you assisted at all by the Whirlpool Corporation?

A No, this was entirely my own undertaking. Every aspect of the marketing of this machine I undertook myself. That was our arrangement.

Q What did you do to create service outlets?

A Well, I went first and made an arrangement with the RCA Service Company to handle service. I also set up independent, went to and set up independent vacuum cleaner service agents in all cities we were selling in, because without service is no good. I had to physically go and set them up.

Q Was any training involved?

A Yes, sir, extensive training and parts information. We developed on our own literature that showed an exploded version of the vacuum cleaner, and identified every single part by number. We developed the literature that went into the machine that told the customer the things to look for, simple things that might go wrong so they might do this themselves. Every single part of the machine was identified by number, so the customer could go if he chose to, if he moved to Nome, Alaska, he could go right to us and get the necessary part.

Q WWho paid for the people who performed these services on the vacuum cleaners made by Whirlpool?

A The Oreck Corporation paid for every bit of this.

Q Now, sir, did you take any steps to try to produce a favorable popular image for this vacuum cleaner?

A Yes, sir. Once we established distribution in a given market, we set up advertising budgets. We advertised with the retail account who was handling the units and we ran advertisements in local newspapers and magazines.

Q The advertisements of which you speak, did they feature the fact that the machine was manufactured by Whirlpool?

A Yes, sir, every ad was a Whirlpool ad. Our name, if it was on it, was very small. We were selling Whirlpool not ourselves.

Q These ads were ads that the Oreck Corporation paid for?

A Yes, sir.

Q I show you what has been marked as Plaintiff's Exhibit 14 for identification and ask you if you can tell us whether these are exemplars of what you have just been testifying about? Are these some of the ads you refer to?

A Yes, these are some of the ads that we ran. This is a full_page ad in color.

Q When you say this, can you identify that?

A This is a full_page ad in the Ladies Home Journal.

Q That is the first page of this exhibit for identification?

A Yes, sir, in November of 1964. This is a full_page ad.

Q What is the second page?

A The first page is a picture of the cover of the Ladies Home Journal of that particular issue that contained our advertisement.

The second is the advertisement itself, which states:

"Will pay you $10 if the new two-motor RCA-Whirlpool home cleaning system does not pick up hidden dirt your cleaner leaves behind."

We went out and actually made demonstrations in response to people's requests.

Q How about the third, the long page?

A This is a page ad that appeared in the New York Sunday Times also in late 1964, the headline of which reads:

"The new RCA-Whirlpool two-motor vacuum picks up everything but men and money."

Q And the final page? I do not mean to rush you. Is there anything more you mean to say about that?

A This is an ad devoted entirely to the 38 features of the RCA-Whirlpool vacuum cleaner and it is labeled with the RCA-Whirlpool logo, our name being very small down underneath, and it features, as you can see, the canister that I described before with this motorized attachment.

Q And the final page?

A The final page is another full page ad that also appeared in the New York Times in 1965, and that is an ad

headlined Klean Kong, and it is an RCA-Whirlpool vacuum cleaner CBR. At this time it was called the LB-55, but it is the same model. It featured the little upright cleaner. And these represent some of the ads. We also had ads in the New Yorker Magazine and so on.

3 MR. HOFFMANN: Your Honor, I offer these four pieces of paper stapled together as Plaintiff's Exhibit 14.

* * *

(Plaintiff's Exhibit 14 was received in evidence.)

xx MR. HOFFMANN: May I show this to the jury?

THE COURT: Yes.

(Plaintiff's Exhibit 14 given to the jury.)

* * *

T5 Q Just before the recess, Mr. Oreck, you spoke of the advertisements which are now in evidence as a step Oreck Corporation took to try to induce a popular image for the machine.

Did you take any other steps looking towards that end?

A We had an extensive program of what we called cooperating advertising, which is advertising that we run with retail stores where we pay for most of the cost of those ads, but the ads appear over the name of the store.

We also offered a money-back guarantee if the customer was not completely satisfied. We felt that that was necessary to do to insure that we could get the maximum sales and put people's mind at ease about this product.

* * *

Q When did you first begin to sell Whirlpool vacuum cleaners?

A The first delivery of Whirlpool vacuum cleaners began in March, the first 500 units under the terms of our contract, the first 500 units began in March of 1964.

Q When did you institute the money-back guarantee?

A We really instituted that from the inception.

Q Does that mean if a customer didn't like it he could get his money back?

A Yes, within a reasonable period of time following the sale. "Reasonable" usually was 30 to 60 days.

Q You are going to have to state again when it was that you first sold the machines in '64. Did you give the month?

A We started in late February and March to make deliveries. I had been out soliciting orders well before that time, but I had nothing to deliver. All I could show was the samples.

Q Why was that, sir?

A The production did not come as fast as it was supposed to.

Q Do you know the reason? Were there any reasons for the delay?

A There are always delays apparently in the production of any new product, unforeseen things that happened that delayed and there are so many little things that can go wrong, any one of which will delay the production, and we experienced our share of those.

Q During the year '64 do you know how many units Oreck bought from Whirlpool?

A I would say in our first contract year, that is, which began in March of '64, that we purchased approximately 10,000 units.

* * *

* * *

Q During the early years you mentioned some delays. Were there other delays later on in production?

A Yes, there were.

* * *

* * *

Q Mr. Oreck, you testified earlier that you were promised delivery and that you started to solicit orders and that you couldn't in fact begin to make deliveries until February or March of 1964. Is that a correct appraisal of your testimony?

A Yes.

Q I ask you then did you know of any reason why you didn't receive vacuum cleaners in order to sell them until that time, until February or March of '64?

MR. TUROFF: Your Honor, I object. We have been through all of this. The witness has testified to it. We will never get out of here if we continue going over it again and again.

THE COURT: I am going to sustain the objection on the ground of form.

What were you told were the reasons for the delays?

THE WITNESS: The delays?

THE COURT: No, whether or not there were

delays, you got deliveries on certain dates. Did you have discussions on the dates the merchandise was delivered with people at Whirlpool?

THE WITNESS: Yes, I was in almost daily contact with the plants and the -- there were varying reasons for delays. They all had to do with the shortage of this or failure of that. Related -- production related problems, apparently, and I was also told that I did not have the top priority as far as delivery was concerned.

MR. TUROFF: I am going to object to that, your Honor. No foundation.

THE COURT: Who was it that told you this and when were you told that?

THE WITNESS: I was told this by Mr. Ken Johnson, who was then in charge of contract special product sales, I believe his title was, at the St. Paul plant of Whirlpool.

THE COURT: What did he tell you?

THE WITNESS: He told me this in my numerous conversations in late 1963 when I was looking for delivery.

* * *

* * *

Q I show you what has been marked as Plaintiff's Exhibit 16 for identification and ask you if you can tell us what it is?

A (Examining) This is a letter dated October 24, 1966, addressed to Mr. Sol Sweet of the Whirlpool Corporation in Benton Harbor, Michigan, sent him by me.

* * *

Q Mr. Oreck, who was Sol Sweet in October of 1966?

A Sol Sweet was the manager of contract sales for Whirlpool Corporation.

Q And did he have management duties in relation to the contract which Oreck had with the Whirlpool Corporation?

A Yes, he did. He was Mr. Payne's boss.

Q And who is Mr. Payne?

A Mr. Payne was in charge of sales at the St. Paul plant of special products.

Q Getting back to Mr. Sweet, did you have the

practice of reporting to Mr. Sweet from time to time as to business done by the Oreck Corporation in selling Whirlpool vacuum cleaners?

A Yes, I did, when I felt as though the problem warranted his attention.

Q And did you have conversations with Mr. Sweet from time to time concerning such products?

A Yes, we also talked on the phone numerous times.

* * *

* * *

Q Did you have an occasion to make suggestions to Whirlpool as to changes in the machine itself?

A Yes, we made many suggestions to them.

* * *

* * *

MR. HOFFMAN: May the reporter be asked to read the question back which he was answering?

THE COURT: I think, Mr. Oreck, you were being asked about whether or not you had made certain design change suggestions to Whirlpool. Is that correct?

THE WITNESS: Yes.

THE COURT: And you had given an answer which was you had and that those had followed certain problems that you had in the field with these vacuum cleaners. Is that right?

THE WITNESS: Yes, sir.

* * *

Q Mr. Oreck, I show you what has been marked Plaintiff's Exhibit 19 for identification. Is that a document which was received by you?

A Yes, it is.

* * *

(Plaintiff's Exhibit 19 received in evidence.)

MR. HOFFMAN: This letter is on the stationery of Whirlpool, Benton Harbor, Michigan, the administrative center, March 1, 1968. It is addressed to Mr. David Oreck, president, MacDonald Sales Corporation, 5500 Jefferson Highway, New Orleans, Louisiana.

(Mr. Hoffman read from Plaintiff's Exhibit 19 in evidence.)

Q Do you have any recollection here and now as to what the reference to "Your efforts starting to pay off" is?

A Yes, this was a letter that I went to Jack Sparks who in turn gave it to Sol Sweet.

Q Does this have anything to do with an increase in sales? Is that what the letter is about?

A Yes, sir, it has to do with our increased sales.

* * *

Q Well, sir, had you had an increase in the volume of sales over the previous year by the time this letter was written, as you say, about March of '68?

* * *

* * *

A We had experienced an increase in sales. We had the defective products largely behind us which had adversely affected our business and we now were experiencing a good increase in sales which was very gratifying to me and I so wrote Mr. Sparks a letter.

Q Do you know whether at this time you were meeting the contract requirements for purchases for vacuum cleaners from Whirlpool?

MR. TUROFF: I object to that. It calls for a conclusion.

THE COURT: What is the requirement you wish to address his attention to?

MR. HOFFMAN: The requirement that the contract which specifies the amount of units to be purchased from year to year. This is a conclusion. It is the kind of conclusion a businessman must reach at his peril every day in his life.

If your Honor will look at page 2 of the agreement it has the schedule on top of the page as to the

units which would be purchased during the periods of time designated.

THE COURT: Yes. I will sustain the objection to the form of the question, but you may ask him what rate he knew he was ordering at the period he was talking about.

Q Would you be kind enough to answer the question put to you by the Judge?

A I do not recall the rate at which we were ordering precisely at that time.

Q Do you know whether or not you had purchased more than 20,000 units during the third 12-month period following the starting date?

A I believe that we did.

Q In 1968 what means were being used to distribute the Whirlpool vacuum cleaners?

A Our principal means of distribution was by direct mail and through out institutional supply wholesalers.

Q Were you still using stores?

A We used some stores, but not a great many. We had lost many of our good stores --

MR. TUROFF: I am going to object to that, your Honor. It is not responsive to the question and it is --

THE COURT: Repeat the question and answer.

(Read.)

THE COURT: Overruled. Go ahead.

* * *

Q Is the name Ozite familiar to you, Mr. Oreck?

A Yes, Ozite is familiar to me.

Q What is Ozite?

A Ozite is a manufacturer of carpet best known for their indoor-outdoor carpets.

Q Did you attempt to sell Ozite your vacuum cleaners?

A No, we did not come to sell them our vacuum cleaners.

Q Did you make any promotional efforts in respect of selling your vacuum cleaners in which Ozite played a part?

A Yes, indeed. We spent a good deal of time with Ozite demonstrating our product and how it worked on their products, and as a result of, I believe, about two years' effort we got an unqualified endorsement from Ozite of the Whirlpool vacuum cleaner which they sentout to all of their

retail carpet dealers, and they also advised customers who were having difficulty cleaning Czite carpet that they found the ultimate answer was the Whirlpool upright vacuum cleaner. It was a very helpful endorsement.

* * *

Q Mr. Oreck, in 1968 did you have an occasion to meet with Messrs. Sparks and Payne and discuss such matters as the volume of sales being made by Oreck Corporation of Whirlpool vacuum cleaners?

A Yes, I met with Sparks and I talked on numerous occasions with Mr. Payne.

Q Did you have any telephone conversations concerning the subject matter of how well Oreck Corporation

was distributing the Whirlpool vacuum cleaner during the year 1968?

A Yes, I had many such conversations.

Q With what persons, with whom?

* * *

A Jack Sparks and Sol Sweet commended me on the upturn in sales that we were experiencing.

THE COURT: When you say "commended," what do you mean?

THE WITNESS: They complimented us; they realized that I had worked terribly hard on this and they were complimenting me. I knew all these people quite well.

Q Sir, these conversations you say took place in 1968. Can you give us any more specific timing as to them? Any particular dates?

A I recall it was early in 1968. I don't recall the specific date at this time.

* * *

* * *

Q Mr. Oreck, I address your attention to Paragraph 2 of what is in evidence as Plaintiff's Exhibit 3, which authorizes you to distribute vacuum cleaners in the United States and its possessions. Do you see that, sir?

A Yes.

Q In the early days of your franchise agreement where did you resell Whirlpool vacuum cleaners bought from Whirlpool?

A In the United States and its Possessions.

Q Did you sell any anywhere else in 1964?

A No, sir, I sold only in the United States.

Q And in 1965?

A No, sir. I sold only in this country.

Q And in 1966?

A In 1966 we did sell some units in Canada.

Q Who was your customer there? To whom did you sell the units?

A Our customer was Dustbane Industries.

Q Do you know how many units you sold to that customer?

A We sold them 500 units, as I recall.

Q Was Whirlpool aware of these sales in Canada to Dustbane?

A Yes, they were. Mr. John Payne of Whirlpool was informed Dustbane had made purchase for testing and evaluation.

Q Did he say anything to you about it?

MR. TUROFF: I am going to object, unless there is a foundation to the conversation.

THE COURT: What foundation do you claim is lacking?

MR. TUROFF: We don't know where or when he had this conversation.

Q Mr. Oreck, the conversation of which you have

just spoken, can you tell us approximately when it took place?

A I believe it was in the Spring of 1966.

Q Can you tell us where or under what circumstances?

A The conversation?

Q The conversation with Mr. Payne.

A Yes, sir. We had exhibited our vacuum cleaners at the ISSA Exhibition, which is an institution of sanitary supply wholesalers. At that time Dustbane came to our exhibit and saw this and ordered it, and Mr. Payne was aware that we were exhibiting there. After Dustbane placed their order, which, I recall, was in the Spring of 1966, I called Mr. Payne and I told him that we had received this order and he advised me, he said he was elated that we had opened up a new field of distribution, Dustbane being the largest distributor in Canada in this field.

xx (Plaintiff's Exhibit 26 marked for identification.)

Q Mr. Oreck, I show you what has been marked --

MR. TUROFF: May we see it?

Q I show you what has been marked as Plaintiff's Exhibit 26 for identification. You notice that this contains a copy of a letter from Don H. Galloway, Sales Manager, Whirlpool International Division, to yourself

under date June 3, 1966?

A Yes, sir.

Q Do you recall receiving this letter at or about the time indicated?

A Yes, sir, I do.

Q Attached to the exhibit for identification on the first page there is in handwriting an envelope addressed to John Payne, Whirlpool Corporation, bearing two dates, April 12 and April 13, 1966. Do you see that?

A Yes, sir, I do.

Q Whose handwriting is that envelope in?

A That is my handwriting.

Q Then immediately beneath that in what I call a bucksheet saying "David Oreck" on top and briefly reads, "John: Does this still hold?" Signed "David." And "Please return letter to my file."

Are you familiar with that handwriting?

A Yes, that is my memorandum.

Q That is yours?

A Yes, sir.

MR. HOFFMAN: I will ask that it be received. I offer in evidence Plaintiff's Exhibit 26.

MR. TUROFF: I have a question first, your Honor.

The exhibit that was handed to me as to other pages on it. I take it these two pages are not offered?

MR. HOFFMAN: No.

MR. TUROFF: What you are offering are three pages of the exhibit, what you call the buckshects,the letter and the envelope?

MR. HOFFMAN: You have successfully summarized what I said to the witness a little while ago.

MR. TUROFF: We would object basically on the time period, your Honor. This is certainly not within the time period that we are interested in here. It does not bear on the issues before us.

THE COURT: I will overrule the objection. It will be received.

xx (Plaintiff's Exhibit 26 received in evidence.)

BY MR. HOFFMAN:

Q Do you have any recollection of the circumstances to which this letter relates, Mr. Oreck?

A Yes, I do.

Q Will you describe them to us, please?

A On or about the 1st of June, 1966, I called Mr. Don Galloway of Whirlpool International Division in Benton Harbor, Michigan, and I told him that we were receiving

inquiries and, in fact, orders from customers who wanted to purchase our Whirlpool vacuum cleaners in Canada, and I asked him for permission for us to sell and solicit those orders. The letter that he sent on June 3rd, which you have here is his answer to me relative to what he told me on the phone; it is a confirmation of that telephone conversation denying me that right.

MR. TUROFF: I am going to object to that. The letter will speak for itself.

THE COURT: Yes.

MR. HOFFMAN: I will read what is said at the bottom of the letter of June 3, 1966, which is in evidence under date of 8-17-66:

"Don't want to get involved at this time with distribution of this product in Canada.

"Sol."

Q Sir, do you know in whose handwriting that note is written?

A Yes.

Q How do you know it?

A I recognize my communication with him, and there was only one Sol in this position, anyway.

Q Who is that?

A That is Sol Sweet, who was the director of all

contract sales for Whirlpool in Benton Harbor, Michigan.

Q Did Mr. Sweet afford you any explanation as to why Whirlpool did not want to get involved in the distribution of vacuum cleaners in Canada?

A Mr. Sweet told me --

MR. TUROFF: Objection, your Honor, unless there is a foundation for the conversation.

MR. HOFFMAN: The foundation is --

THE COURT: Let us establish when it was.

MR. HOFFMAN: I have to first establish whether or not therewas a communication, which was the purpose of my question, your Honor. I will be glad to rephrase it.

THE COURT: Mr. Turoff will object, unless there is a foundation laid as to where and when and who he was talking to.

MR. TUROFF: The question was not objectionable. I think the witness jumped the gun and did not answer the question that was asked of him.

May I have the reporter read the question?

THE COURT: Let us go forward.

You had a conversation with somebody?

THE WITNESS: Yes.

THE COURT: Whom did you have it with?

THE WITNESS: I had two conversations.

Q Try to separate them in your mind, if you can, Mr. Oreck, and tell us who participated in the first and when.

A When I received this letter from Mr. Galloway, which immediately followed the telephone conversation that I had with him, I talked to John Payne in St. Paul. I asked him --

Q Pardon me. Was this in person or on the telephone?

A I talked to him on the telephone shortly after receiving this letter. I asked him if there was not any way I could get this reversed, and he told me that he didn't understand it himself, but suggested that I send him a note relative to this and he would take it up with his superiors.

Q Did you do anything in response to that call?

A Yes, sir. I took his advice and I mailed him the letter, together with this memo here, which said, "John, does it still hold?" And I attached it to this letter that said I couldn't sell in Canada, and I mailed it all to him.

MR. TUROFF: I object to the witness's characterization of the letter.

THE COURT: The letter speaks for itself.

MR. TUROFF: I move to strike it.

THE COURT: Yes.

You sent him this letter?

THE WITNESS: I sent him the letter with the memorandum that is attached to the letter, and at about the same time, which would have been again around the 6th or 7th of June of 1966, somewhere right in that period, I called Mr. Sol Sweet, who was Mr. Payne's superior in Benton Harbor, and appealed to him to see what he could do with Mr. Galloway to get this reverted.

Q Do you remember anything else about the conversation? What he said to you?

A He said he would look into it.

Q Did you hear anything further from him concerning that subject matter?

A I did not hear from Mr. Sweet on the subject. I did hear from John Payne.

Q About when did that happen?

A I heard from John Payne on or about the 20th of August, I would say.

Q What was your communication? Was it by telephone?

A Yes, it was by telephone. I talked to Mr. Payne almost every day or every other day, and Mr. Payne told me then that Mr. Sweet had advised him that the matter

stood as it was, no change.

Q Was there ever any change as to that?

A There was never any change in the position of Whirlpool as far as I knew.

xx (Plaintiff's Exhibit 28 marked for identification.)

Q Mr. Oreck, I show you what has been marked as Plaintiff's Exhibit 28 for identification and ask you if this is a document which you received?

A This was a document that was mailed to us by Dustbane Enterprises.

Q I notice that the document is sent to Oreck Corporation, Attention Mr. Murray Fink, Sales Manager. Did you receive it at about May 19, 1967, personally?

A This was mailed to our office in Stamford, Connecticut, and I received it shortly thereafter.

Q Is Mr. Dale known to you?

A Yes, he is the manager of Dustbane Enterprises, Ltd. of Ottawa, Canada.

MR. HOFFMAN: Your Honor, I am going to offer in evidence, and I anticipate an objection, this document. I ask that the Court focus its attention on Rule 803.3 as it is now, the state of mind exception to the hearsay rule.

THE COURT: Let me ask this: was this letter

the subject of any discussion with the Whirlpool people?

MR. HOFFMAN: I am not making that claim, but it is offered in conjunction with the transactions which has just been described in the witness's testimony.

THE COURT: You say you urged this under 803.3?

MR. HOFFMAN: Yes. I will be glad to state Weinstein's Book on Evidence in commenting on 803.3.

THE COURT: I will reserve decision.

(Plaintiff's Exhibit 29 was marked for identification.)

xx Q If your Honor please, once more I ask the witness to look at this letter and tell us when this letter first came to his attention, if it did.

A (Examining) This letter is dated July 9th, 1968 and we received it shortly thereafter, in July of '68.

MR. HOFFMANN: Your Honor, this is also a communication from Dustbane Enterprises of Canada from the general sales manager. It is addressed to Oreck Corporation under date July 9, 1968.

Once again here perhaps I should approach the side bar, if I may, your Honor, and describe it.

THE COURT: All right.

(At the bench.)

MR. HOFFMANN: Your Honor, if you will notice this is in the testimony we had about seeking sales of Canada and getting CSA approval.

THE COURT: Yes.

MR. HOFFMANN: Therefore, it seems to me that her you have the modern application of the old res gestae rule.

THE COURT: No. Don't you connect these matters up in some way by talking to him about these matters?

MR. HOFFMANN: Yes Maybe I should not offer

it at this time.

THE COURT: All right.

(In open court.)

BY MR. HOFFMANN:

Q Mr. Oreck, can you tell us what CSA is?

A CSA is Canadian Standards Association, I believe it is. It is the equivalent of our underwriter laboratories, the Canadian equivalent of our underwriter laboratories here in this country.

Q Do you know what function it discharges?

A Yes, it tests products for their safety and if that passes, as in the case of UL, they issue you approval.

Q Can anyone bring a product to CSA and say, "We would like this tested" and obtain approval if it meets standards?

* * *

A Any manufacturer can present it to them, not anyone.

Q Not any customer?

A Not any customer. A manufacturer, the maker

of the product, any maker, any manufacturer, can present his product to them for testing and evaluation and a possible approval.

Q Did Oreck Corporation at any time ask that Whirlpool secure CSA approval for goods -- Whirlpool products to be sold in Canada?

A Yes, sir, we asked for CSA approval.

* * *

Q When did that happen?

A We asked for CSA approval on all of our products at the same time that we got UL approval. It was customary to do that then.

* * *

Q Will you please address yourself, Mr. Oreck --

A Sorry.

Q -- to the question of when you first asked Whirlpool to procure CSA approval for Whirlpool products which you wished to sell in Canada?

A Specifically I asked Whirlpool to obtain CSA approval in the spring or thereabouts of 1966 with the first orders of Dusbane.

2 Q Did you make it known to Whirlpool that you had orders from Dustbane at or about that time?

A Yes, I did. Mr. John Payne was so informed.

Q And what happened after that in connection with achieving CSA approval?

A we were -- we never did receive CSA approval because the product was never submitted to CSA for approval.

Q You said a moment ago that the CSA was like the UL, the Underwriters Laboratory?

A Yes, sir.

Q That is the Underwriters Laboratory of the United States; is that right?

A Yes, sir.

Q Are the standards of the two similar, if you know?

A They are very similar. They differ slightly but they are very similar.

Q Do you know of any structural reason in the vacuum cleaners made by Whirlpool which wou would bar Whirlpool from achieving CSA approval?

A John Payne told me there was no reason --

MR. TUROFF: I object. Now you are getting into a conclusory area of what a product could do.

THE COURT: I agree with you that this witness has not demonstrated sufficient expertise to testify on that subject, but the conversation with John Payne about it is admissible testimony.

MR. TUROFF: If there is a foundation.

MR. HOFFMANN: The foundation is, your Honor, he already said he had a conversation with John Payne.

THE COURT: All he wants to know is when and the circumstances.

MR. HOFFMANN: These are separate questions, when and where.

THE COURT: I understand that.

MR. HOFFMANN: Thank you.

Q When did that conversation take place, Mr. Oreck, the conversation you just referred to with Mr. Payne?

THE COURT: You said you spoke to Mr. Payne about

having to do with structural aspects of the machine in regard to Canadian standards. When did you have that conversation?

THE WITNESS: I had that discussion with Mr. Payne some time in the spring of 1966.

THE COURT: What did you say to him and what did he say to you?

THE WITNESS: I requested that he submit promptly -- that Whirlpool submit promptly to CSA for approval so that we could do business in Canada because I had an order and an interest from the largest customer in Canada.

I asked Mr. Payne at the time was there any reason why we shouldn't get that promptly. And he said there was none whatsoever, that in fact they had such an approval on the Sears model that's in this room here.

Q Are you saying that this --

MR. TUROFF: I am going to object to this entire conversation.

THE COURT: Strike out the last statement about "in this room".

Did they have approval on some other model?

THE WITNESS: Yes, sir.

THE COURT: What did he say?

THE WITNESS: He told me that they had approval on the Sears upright model that is the counterpart of ours.

MR. TUROFF: I object.

Q What is the number of that model?

MR. TUROFF: I object to "counterpart," unless this is Mr. Payne's word.

THE WITNESS: Yes, sir.

THE COURT: Is that what he said to you?

THE WITNESS: Yes, he did, and the model number I believe is 3928. I think that's the number of it.

THE COURT: All right. The objection is overruled.

MR. TUROFF: Your HOnor, may I have a continuing objection to this entire line of inquiry on the basis of the time period and the relevance to the issues in this case?

THE COURT: You may have a continuing objection.

MR. TUROFF: Thank you.

Q Now, sir, when you spoke of your conversation with Mr. Payne a moment ago, did you know the number of the vacuum cleaner which he said had approval? Can you give us that?

A I believe it was the 3928. I knew the model by description and I think it was the 3928 number that he

gave me. I'm not as familiar with Sears model numbers as my own.

Q Do you know whether it customarily appears on the base plates of vacuum cleaners?

A Yes, sir, they generally do.

Q With your Honor's leave, I will ask the witness to take a look at this machine to see whether this is the machine as to which the testimony shows there was an approval by CSA.

(Handing to the witness.)

A This is the serial number and it gives the model number and the model number reads 11639280 they added on. And it says, "Sears Roebuck, Simpsons Sears" on it.

Q And what is Simpsons Sears?

A That is the Canadian affiliate of Sears Roebuck.

Q Incidentally, Plaintiff's Exhibit 5 which says "CVR Whirlpool 2000" -- is this the one for which you wanted approval to sell in Canada?

A It's the same machine, yes, sir, in a different color actually.

Q Now, sir, after the new agreement was reached, the agreement which lasted according to your tesrimony until 1971, what products were you permitted to sell under that agreement?

MR. TUROFF: I have an objection, your Honor. The agreement will speak for itself if it is introduced. It is a written agreement between the parties.

MR. HOFFMANN: Yes, it will be introduced at lunch, your Honor. I thought we could save ground. There are just two product numbers that we mentioned. May I hold this matter for a moment?

THE COURT: I assume there will be no objection to this exhibit.

MR. TUROFF: I haven't seen it yet, your Honor.

THE COURT: 44 for identification.

* * *

* * *

(Plaintiff's Exhibit 44 was received in evidence.)

xx THE COURT: The question was whether under that agreement there were certain model numbers that were designated.

MR. HOFFMAN: I was asking the witness what vacuum cleaners made by Whirlpool he was able to sell pursuant to this new agreement which is now in evidence as Plaintiff's Exhibit 44.

THE COURT: Does the agreement provide the numbers?

Mr. Oreck, does the agreement specify that?

THE WITNESS: Yes, it does.

THE COURT: Will you focus on that page and tell us what model that agreement has reference to?

THE WITNESS: This agreement, Paragraph 2, provides that I have one vacuum cleaner, Whirlpool upright, present Model No. CVR-1000 and one attachment, hose and electric powered brush, Model AP-8.

* * *

Q Mr. Oreck, did you have after this new agreement was reached any inquiries from potential customers expressing an interest in purchasing Whirlpool vacuums other than the makes you have just described?

MR. TUROFF: Objection, your Honor. It is clearly hearsay.

* * *

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THE COURT: Ladies and gentlemen, this is a little better. We don't have the noise. I told the lawyers if they wanted to take their jackets off they could do so. You may, too.

Go ahead, Mr. Hoffman.

I am going to admit in evidence Exhibit 28 for identification and overrule the objection to those phone conversations on the authority set forth in Weinstein 803-100, 507 F. 2d 349 and 514 F. 2d 1184.

xx (Plaintiff's Exhibit 28 received in evidence.)

MR. HOFFMAN: Your Honor, I assume the same objection would attach to 29 as to 28, and I am not sure how the record stands as to the ruling.

THE COURT: Objection overruled.

MR. TUROFF: I want the record to show my objection for the same reasons to 29 as to 28.

THE COURT: I understand.

xx (Plaintiff's Exhibit 29 received in evidence.)

MR. HOFFMAN: May I read from these?

(Mr. Hoffman reads from Plaintiff's Exhibits 28 and 29 to the jury.)

BY MR. HOFFMAN:

Q Can you tell us what type of vacuum cleaner is the CBR 1000?

A It is the upright vacuum cleaner, just like this one.

Q And in Plaintiff's Exhibit 28 reference is made to CBR 500 Magic Carpet, Rug & Floor Vacuum Cleaner. Can you tell us what type that is?

A It is the same cleaner, except in red. It differs only in color.

Q Pointing to --

A Pointing to this unit here.

Q They are both the same, except one is red?

A The 500 was red and the 1000 was black.

xx (Plaintiff's Exhibit 32 marked for identification.)

Q Mr. Oreck, I show you what has been marked as Plaintiff's Exhibit 32 for identification and ask you to notice that it bears the date March 4, 1970.

Can you tell us what this is?

A Yes, sir. This is a meeting report that was sent to us by John D. Payne, of Whirlpool Corporation, head of Contract Sales there, and it outlines all of the things that took place in that meeting of March 4, 1970,

and all of the people who were in attendance at that meeting.

Q Was a representative of Oreck Corporation present at the meeting?

A Yes, Mr. Marshall Oreck was present and Mr. Robert Miller was present.

MR. HOFFMAN: I offer 32 in evidence.

* * *

* * *

xx (Plaintiff's Exhibit 32 received in evidence.)

MR. HOFFMAN: With your Honor's permission, I won't burden the record by reading all, but I may clearly designate the parts that I wish to emphasize.

Plaintiff's Exhibit 32 is entitled "Whirlpool Corporation, Contract Sales Division, Meeting Report," dated March 4, 1970.

"Visitors:

"Mr. Marshall Oreck, and Robert Miller," both of the Oreck Corporation.

"Purpose of Meeting:

"I. Review Engineering Programs on CAP - 33 and CVR - 3000.

"II. Obtain information relative to quality complaints arising from cover plate replacement program on CVR 1000s.

"III. Review and Plan for LaPorte visit due 3/10.

"IV. Miscellaneous."

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Then there appears to be an item "I. Engineering Statement," and reference is made to "CAP-33 powermate was reviewed and the following was agreed to:

"a. Obtain U.L. as well as CSA approval."

And then father down on the page, on page 2:

"CVR-3000 upright was also reviewed, and the following was agreed to:

"a. Obtain CSA as well as U.L. approval."

BY MR. HOFFMAN:

Q Mr. Oreck, the two items I read contain references to different machines? Is that correct?

A Yes, sir.

Q In the first instance I read "CAP-33 powermate was reviewed and the following was agreed to." Is the CAP-33 a machine sold by the Oreck Corporation?

A Yes, it was, a motorized attachment.

Q What is it attached to?

A It is attached to the cannister and it succeeded the AP-28 attachment we had over here. It was the next model of this one.

Q Then, sir, farther down on the page, "CVR-3000 upright was also reviewed, and the following was agreed to:

"a. Obtain CSA as well as U.L. approval,"

what was the CVR-3000?

A The CVR-3000 is exactly the same as the 2000, differing only in that the end of the plug has three prongs, instead of two prongs.

* * *

Q Mr. Oreck, I call your attention that in Plaintiff's Exhibit 28 in evidence the date of the letter from Dustbane is May 9, 1967, that the date on Plaintiff's Exhibit 29 in evidence is July 9, 1968, and that the meeting report, Plaintiff's Exhibit 32, and from which I just read with its reference to obtain approval for CSA as well as U.L. approval is dated March 4, 1970.

Mr. Oreck, how long a period of time was the Oreck Corporation requesting that Whirlpool obtain CSA approval?

A From 1966 forward.

Q Do I understand your testimony to be that the approval was never obtained?

A Never obtained.

xx (Plaintiff's Exhibit 34 marked for identification.)

BY MR. HOFFMAN:

Q Mr. Oreck, I show you Plaintiff's Exhibit 34 for identification and ask you if you can tell us what it is?

MR. TUROFF: May we have a copy?

A This is a Western Union telegram dated April 15, 1970, from John D. Payne of Whirlpool to myself as president of the company.

Q The telegram was one received by you? Is that correct?

A Yes, sir, it was received by me.

MR. HOFFMAN: I offer it in evidence as Plaintiff's Exhibit 34.

* * *

xx (Plaintiff's Exhibit 34 received in evidence.)

* * *

* * *

MR. HOFFMAN: Plaintiff's Exhibit 34 now in evidence bears the date April 15, 1970, and it reads as follows:

"Mr. David Oreck, President.

"MacDonald Sales Corporation

"5000 River Road, New Orleans, Louisiana.

"I regret to advise that I am unable to obtain a waiver to the current franchise to permit Canadian marketing."

* * *

* * *

Q Sir, did you have a current franchise, you, Oreck Corporation, to sell in Canada as at that time?

MR. TUROFF: I object, your Honor. The agreements between the parties are in evidence and will speak for themselves.

THE COURT: I assume the answer to that is yes or no.

MR. HOFFMAN: That is all I want.

MR. TUROFF: Your Honor, may we approach the bench?

THE COURT: Overruled. Please.

Did you have a current franchise?

THE WITNESS: Yes, sir, I had a current franchise.

* * *

* * *

Q Mr. Oreck, I show you Paragraph 2 in Plaintiff's Exhibit 3 in evidence, which is the agreement of August 7 --

I want the later agreement --

MR. TUROFF: May we approach the bench?

THE COURT: No, these bench conferences at times take more time than they are worth. If there is a place in the agreement that applies to the limits of territory, have it read to the jury.

MR. HOFFMAN: In Item 2, August 7, 1963,

contract:

"By this letter Whirlpool is appointing you as its exclusive distributor for the products and those component parts and accessories of such product which are unique in application to and used with such products for the United States of America and its possessions, herein called Merchandising Area."

MR. TUROFF: I object and move to strike the characterization of this contract.

THE COURT: He is reading from an exhibit in evidence.

MR. TUROFF: He is reading it as a characterization of a restriction.

THE COURT: Motion denied. The jury will draw its own conclusions of language.

MR. HOFFMAN: I am now reading from Item 3 of the contract between Whirlpool and Oreck, dated August 1, 1968, which is in evidence as Plaintiff's Exhibit 44:

"By this letter Whirlpool is appointing you its exclusive distributor for the products and those component parts and accessories of such products which are unique in application to and used with such products for the United States of America and

its possessions, herein called merchandising area."

* * *

Mr. Oreck, do you know any other means by which the marketing area was defined in this case or any other writings, any other conversations bearing upon the marketing area?

THE WITNESS: No, sir.

BY MR. HOFFMAN:

Q Mr. Oreck, in selling your products, in what countries did you sell them?

A I sold them in the United States and in its possessions, and I did sell some in Canada.

Q When did you make sales in Canada?

A I first made some sales in Canada in 1966.

Q Were those sales made with the approval of the Whirlpool Corporation?

MR. TUROFF: I object.

THE COURT: Sustained as to form.

Q Did you have any conversations with the representatives of the Whirlpool Corporation prior to making such sales in relation to identifying them? That you had such sales in contemplation?

A I did not have such conversations in contemplation of the sale, only following the sale.

Q Tell us about the conversations. When was the first and with whom?

A My first conversation was in the late Spring of 1966 with John D. Payne of Whirlpool after I took an order from Dustbane Industries of Canada.

MR. TUROFF: I object to this. The witness testified this morning as to the exact conversation. We are going over what is covered.

THE COURT: Overruled. Go ahead.

Q As best you can recall it, what did you say to him and what did he say to you in this conversation?

A I told John Payne at the time that we had just taken an order from Dustbane Industries of Canada, who were the largest in their field in Canada,and that it looked

very promising, that we could sell in great quantity to them. He told me at the time that he thought that was wonderful. He said, "You know, we need to get more sales," and he encouraged me and he complimented me for getting that order.

Q You say you had more than one conversation concerning the matter of selling in Canada with representatives of Whirlpool?

A Yes, sir.

Q What is the next?

A I had conversations, several conversations with Mr. Payne, but I also had conversations with Mr. Sweet. I had conversations prior to talking to Mr. Sweet with a Mr. Woolridge.

Q Can you tell us about when that conversation with Mr. Woolridge took place?

A To the best of my recollection, the conversation with Mr. Woolridge was in late 1966.

Q What was passed between you? What did you say to him and what did he say to you?

A I told Mr. Woolridge that it looked as though we could open up the Canadian market and get a lot of additional sales for Whirlpool there.

Q Do you recall what Mr. Woolridge had to say in

the course of that conversation?

A I think he just said, "That is fine."

MR. TUROFF: I object if he thinks he just said something, if he doesn't know.

MR. HOFFMAN: The fact that he thinks does not mean he doe s not know.

THE COURT: Mr. Oreck, what is your best recollection?

THE WITNESS: My best recollection is that Mr. Woolridge said, "That is just fine; keep up the good work," words to that effect.

Q About when did this conversation take place?

A This took place in late 1966.

Q Now, you indicated that there was yet another conversation; is that correct?

A Yes, sir.

Q And when was that?

A I had a conversation with Mr. Sol Sweet.

Q About when did that take place?

A To the best of my recollection, it took place in late 1967.

Q Was this conversation by meeting or telephone?

A This conversation was by telephone.

Q Who originated the call, if you can recall?

A I originated the call.

Q Tell us as best you can remember what passed between you during that conversation?

A I told Mr. Sweet at that time that we had sales in Canada and great interest in Canada and that I wanted to expand my sales in Canada, but I needed to get CSA approval to do so.

Q And what did he respond?

A Mr. Sweet said he would look into it.

Q Now, sir, after Mr. Sweet said he would look into it, did you have any further sales with your Canadian

customers?

A Yes, sir, we did.

Q When was that?

A We had sales in 1968 that I recall.

(Plaintiff's Exhibit 38 was marked for identification.)

xx Q Mr. Oreck, I show you Plaintiff's Exhibit 38 for identification and ask you if you can tell us what this is.

A (Examining) Yes. This is a memorandum sent to me by Marshall Oreck on December 5th, 1967.

Q Do you know where you were at the time?

A Yes, sir, I was in New Orleans at the time.

Q The memorandum is on a letterhead that shows Stamford, Connecticut?

A Yes, sir.

Q Is that where Mr. Marshall Oreck was then, if you know?

A Yes, sir.

Q Did you have any regular reporting system between you as to the business affairs of Oreck Corporation?

THE COURT: Mr. Hoffmann, this is not a business record, if that is what you are building toward.

Is the witness available, Mr. Marshall Oreck?

MR. HOFFMANN: He will be available.

THE COURT: All right. Why don't you hold it until that time.

MR. HOFFMANN: I will hold it.

* * *

xx

Q Mr. Oreck, will you look at 36 for identification and tell us who John G. Steeb is?

MR. TUROFF: May I see the exhibit, please?

(Pause.)

Q My question simply is, Mr. Oreck, do you know who John G. Steeb was at the time of the letter, April 15, 1970?

A Yes, I know JOhn G. Steeb.

Q What was his function as of that time?

A John Steeb was the general manager of the

contract division in Benton Harbor, Michigan for the Whirlpool Corporation.

Q And the addressee is John Payne, the St. Paul division; is that right?

A Yes, sir.

Q Who was he at the time, if you know?

A John Payne was in charge of contract sales at the St. Paul manufacturing plant of Whirlpool.

MR. HOFFMANN: Your Honor, this document comes from the file. I offer it in evidence.

MR. TUROFF: Objection to relevancy and materiality.

THE COURT: Overruled.

(Plaintiff's Exhibit 36 was received in evidence.)

xx MR. HOFFMANN: With your consent, your Honor, I would like to read the document to the jury.

THE COURT: Go ahead.

MR. HOFFMANN: April 15, 1970, to John Payne, St. Paul division. Subject: Sale of Whirlpool vacuum cleaner to Canada.

(Mr. Hoffmann read from Plaintiff's Exhibit 36 in evidence.)

xx Q Mr. Oreck, do you know the John Inglis Company,

Ltd., Canada?

A I know of them.

* * *

Q What is it you know about this company?

A I understand that John Inglis is associated as a subsidiary of Whirlpool Company in selling merchandise.

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(Plaintiff's Exhibit 37 was marked for identification.)

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* * *

(Plaintiff's Exhibit 37 was received in evidence.)

xx MR. HOFFMANN: Plaintiff's Exhibit 37 in evidence is a Western Union telegram from John Payne to Mr. John Steeb of Whirlpool.

(Mr. Hoffmann read from Plaintiff's Exhibit 37 in evidence.)

xx MR. HOFFMANN: Now, on the second page there is "Attention John Steeb from John Payne of Whirlpool Corporation," a printout, I think, precisely the same remarks.

However, at the bottom of the second page there appears the following --

(Mr. Hoffmann read from Plaintiff's Exhibit 37

in evidence.)

* * *

Q Mr. Oreck, as of 1970, what role did Steeb have in the Whirlpool Company?

A John Steeb was the general manager of the contract division of Whirlpool in Benton Harbor, Michigan.

Q Do you know what his relationship, if any, was to Mr. Payne of the company?

A He was Mr. Payne's boss.

Q And what was Mr. Payne's function at that time?

A Mr. Payne's function was in charge of sales of contract products at the St. Paul division of Whirlpool.

Q Did Mr. Payne have any special relationship to the Oreck Company business?

A He was the man who called on us regularly, receiving our orders and handling our problems, and so on. He was our contact man with Whirlpool.

Q Do you know whether Mr. Steeb had anything to do with the servicing of the Sears account at Whirlpool?

A No, I do not know if he serviced the Sears account.

(Plaintiff's Exhibit 39 was marked for identification.)

xx Q Mr. Oreck, I show you Plaintiff's Exhibit 39 for identification and ask you if you can tell us what this is.

A This is a purchase order from Corneil Vacuum Cleaner Industries of Ottawa, Ontario, Canada, whereby they are purchasing 1000 CVR-1000 Whirlpool vacuum cleaners.

Q Was this order received by Whirlpool, to your knowledge?

A What?

Q Did Whirlpool receive this order?

A No --

Q The document you hold in your hand.

A No, the order was received by the Oreck Corporation.

Q So sorry, I misled you, sir, and I apologize. I had said Whirlpool for Oreck.

Oreck received this order about what time, sir?

A This order was received in late August and initial shipments --

Q Of 1968?

A Of 1968, yes.

Q And there is handwriting on it. Can you tell

us what that indicates?

A The handwriting indicates the quantities and dates and shipping release numbers of the documents whereby we shipped this order to Corneil Industries in Canada.

Q Do you know that the shipments indicated were made?

A Yes, indeed, they were made.

MR. HOFFMANN: I offer Plaintiff's Exhibit 39 in evidence.

MR. TUROFF: No objection, your Honor.

THE COURT: Received.

(Plaintiff's Exhibit 39 was received in evidence.)

xx MR. HOFFMAN: I would like to read, your Honor, just part of the page.

(Mr. Hoffmann read from Plaintiff's Exhibit 39 in evidence.)

Q Then, with your help, Mr. Oreck, perhaps the handwritten notations may be read which you testified to indicate shipments.

A Do you want me to read this?

Q Yes, please. I have difficulty reading the handwriting.

A "100, August 28, 1968 SR-4773.

"200 on September 18, 1968, SR-4864.

"100 on 11/25/68 SR-5113.

"200 on December 2, 1968, SR-5218."

Q Pardon me, sir. Those SR numbers that you read, what do they indicate?

A SR is our shipping release documents, Oreck's shipping release documents.

I see there are more on here, two, Mr. Hoffmann, that I didn't read.

Q I don't think it is necessary to read them all.

A Okay.

* * *

* * *

Q Mr. Oreck, addressing yourself to the year 1968, had you had any indication as of that year that Whirlpool was dissatisfied with the way the Oreck Corporation had been conducted?

A No, sir, I have no indication of that.

Q Did you as of May of 1968 have any indication that Whirlpool at that time had in contemplation the termination of the Oreck franchise?

A No, sir, I had no such indication at all.

(Continued on next page.)

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Q Had you had any indications in 1968 that Whirlpool was, in fact, satisfied with the conduct of the Oreck Corporation?

A Yes, I did

* * *

Q Will you tell us what those indications were?

* * *

A John Payne was our direct contact from the Whirlpool Corporation and he called me on numerous occasions in 1968 and prior, of course, but in April or May and so on of 1968, to congratulate us on the excellent job we were doing. He told me he felt we had really turned the business around and that things were looking good.

* * *

* * *

Q Now, sir, can you do any more to identify the times when these conversations with Mr. Payne took place? Do you have any recollection offhand to establish as to the time of the year 1968 when the conversations were had?

A In the Spring particularly.

Q Did you have any conversations with other representatives of the Whirlpool Corporation during this same period of time concerning the Whirlpool feeling about the Oreck discharge of its franchise obligations?

A Yes, sir, I did.

Q With whom was that?

* * *

A I called on the telephone at Benton Harbor Jack Sparks and Sol Sweet; also, in the Spring of the year, March, April, in that period. I told Mr. Sparks of our progress and the good turn-around in our business. He congratulated me. On or about the same time I talked to Mr. Sweet, who reported to Mr. Sparks. He, too, said that he was delighted and that we were really making such good progress in the business.

Q During the four years in which you have been distributing under the second contract, that is to say, until 1968, was there any suggestion made to you that there had been any change in the distribution agreement or curtailment of the Oreck right to sell Whirlpool products?

A Absolutely none from anyone.

Q Did there come a time in which you were told that there was contemplated termination of the Whirlpool franchise?

A Yes, that time came.

Q When was that, sir?

A In June of 1968.

Q Under what circumstances?

A I received a phone call first from Mr. Sweet of Whirlpool in Benton Harbor.

Q Can you tell us what the content of that telephone conversation was?

A He told me he was calling to arrange an appointment so that he and Mr. Sparks, Jack Sparks, the vice-president, would come to New Orleans and visit with me. I asked him what was the nature of the visit, and he said he did not want to get into all the details, but it was relative to renewal of my contract.

Q Was anything said to you in the course of that conversation which suggested that the contract renewal was in jeopardy?

A The tone of the conversation. When I hung up the phone I realized I was in trouble.

MR. TUROFF: I object to the "tone of the conversation" as the witness's conclusion.

MR. HOFFMAN: May I inquire what is meant by the "tone," your Honor?

THE COURT:- Go ahead.

A My previous conversations with Mr. Sweet were always on quite a friendly basis and an encouraging basis. He was quite curt, would not get into any details, and it was entirely different from any conversation I ever had with him.

Q Did these gentlemen, in fact, come to see you after that telephone conversation was had?

A Yes, sir, they did.

Q About when did that happen?

A In June.

Q Of 19 --

A '68.

Q Where did the visit take place?

A The visit took place in New Orleans. They flew

down in their company airplane and I picked them up at the airport and I took them to my office in New Orleans, and that is where we met.

Q Who was present at that meeting?

A Mr. Sparks and Mr. Sweet.

Q Who from the Oreck Corporation?

A Just myself.

Q Do you remember how long the meeting lasted?

A I would say two hours.

Q Give us as best you can what was discussed during the meeting, trying to identify, please, the persons who were speaking as you described the conversation.

A Mr. Sparks began the meeting and he told me that he had come to inform me that my francise was cancelled and they would try to wind this up in the friendliest way possible.

Q Anything else that you can recall?

A He pointed out to me the terms of the contract whereby he said, "You know, we can cancel this and we are."

Q Was anything else said to you by Whirlpool representatives during that conversation concerning this matter of cancellation?

A I asked several questions and I got very few answers to those questions.

Q Give us your best recollection as to what passed between you in the conversation.

A I asked him why it was -- I must say I was in a state of shock, to begin with; I was kind of at a loss for words -- but I asked them why it was after all I had been through -- and I addressed this to Mr. Sparks, whom I have known for many years -- how after all I had been through, all the time and money and what not that I had been through and after his representations to me that he would never cancel the contract --

MR. TUROFF: I am going to object to this.

THE COURT: No. Apparently this is what was said at that meeting.

THE WITNESS: Yes, sir, that is exactly what was said.

THE COURT: Overruled.

A (Continuing) I said to Mr. Sparks, "After all that I have been through and after your promises to me faithfully from the outset that there would be no time limit on this, that you would do nothing to hurt me, that you would do only things to help me" -- I mentioned when I began this I knew it would take several years to really get this going, I said, "I cannot believe that you would do this to me now." And his answer to me was, "Well,

it is not working out like we thought. You have not set up the kind of distribution that we felt that you should have." And I said, "I don't understand that. You asked me to set up a new channel of distribution for Whirlpool products and I have done that. I have fulfilled every area of my contract, both in the spurt of it and what was said there. There is nothing that I have done that would warrant this."

His answer to me was, "Look, I'm sorry about that, but that is the way it is, and it really doesn't do much for us to talk about it. You are through."

* * *

* * *

Q Mr. Oreck, just prior to the luncheon recess you had been talking about your meeting in New Orleans with a representative of Whirlpool. Have you finished your recollections concerning that meeting?

A Yes, sir.

MR. HOFFMANN: I would like to read from Plaintiff's Exhibit 3 in evidence, which is the contract of August 7, 1963. It is paragraph No. 12:

"Your distributorship may be terminated by Whirlpool prior to the expiration of its term in any of the following events:

"(a) A deterioration in, or the inadequacy of, your financial resources to fulfill your purchase commitments or other obligations hereunder.

"(b) Your disregard of, or unwillingness to adhere to, the provisions of this franchise and other merchandising or business policies of Whirlpool."

Q In the course of your New Orleans meeting, were

any of these matters discussed with you, that is to say, deterioration in, or the inadequacy of, your financial resources, your disregard of, or unwillingness to adhere to, the provisions of the franchise?

A Absolutely not. None of those things were mentioned.

Q In Paragraph 13 there is the following:

"Any change in our relations with a distributor involves a major consideration of policy. It is as vital and important to Whirlpool as it is to the distributor. You may, therefore, be assured that when any of the circumstances referred to in Sub-paragraphs (a) and (b) of Paragraph 12, above" -- and, if I may, that is what I read -- "arrive, they will not only be reviewed carefully with you but will receive the most judicious consideration by not less than three officers of Whirlpool before your distributorship is terminated."

Do you know whether that happened in 1968?

A I do not know whether or not that happened, although I asked.

Q Mr. Oreck, after the meeting had taken place in New Orleans, did you talk with any Whirlpool officials about the matter of getting your distribution contract

extended or perhaps renewed?

A Yes, sir, I talked to John Payne and I talked to Sol Sweet.

Q When did those conversations take place?

A I called John Payne a day or two after the meeting in New Orleans with Mr. Sweet and Mr. Sparks after I recovered slightly from the shock of this, and I told John about it and I asked him if he was aware of this cancelation and he said yes, he was aware of it.

And I said, "John, you have been a friend of mine, we worked together for a long time. What happened here? Where did I go wrong?"

He said, "Dave, I hesitate to tell you this because it could cost me my job, but I think our other customer got to the head of the company."

MR. TUROFF: I am going to object and move to strike. It is simply a statement of opinion by someone else and I think it is improper.

MR. HOFFMANN: If your Honor please --

MR. TUROFF: I would like to be heard on this.

THE COURT: No, I will permit it to stand.

MR. TUROFF: May we be heard at the side bar?

THE COURT: I will take that at the recess. I will permit it to stand.

Q Is there anything more that you remember of that conversation?

A No, that was about it.

Q And then were there any other conversations with Whirlpool officials concerning this scheduled termination?

A Yes, sir. Several days later I thought some more about this and I called Mr. Sweet on the telephone in Benton Harbor to discuss it.

Q What passed between you on that occasion?

A Well, I told Mr. Sweet that I had been thinking about the meeting that we had had. I felt very bad about it, but I was -- felt that I had been deceived and I told him that I had just about everything that I had just about everything that I had invested in this busines, I spent several years of my life all over the place traveling and away from my family, and what-not, and I just wasn't going to take this laying down because I did not feel it was right. I told him that I felt I should talk to Mr. Gray about this and he told me, "Well, that will do no good, the decision has been made, there is no sense of talking to anybody," and so on.

I told him at thattime that I had called a lawyer friend of mine about this and that if some consider-

ation wasn't given I felt that this was nothing that I had done wrong and that in fact this had to do with Sears Roebuck and Whirlpool some way or other.

I, of course, didn't mention Mr. Payne's name, but that's what I was referring to. And I told him that if he didn't reconsider and give me a chance to continue my business, because this would be tantamount to putting me out of business, I would lose everything I had; that I would go to my lawyers on this matter.

And he said, "Well, let me think about this. I'll call you back."

Q Did he in fact call you back?

MR. TUROFF: I move to strike the entire answer as nothing but a self-serving declaration of this witness, not probative of anything.

THE COURT: No.

Let me ask this: Mr. Hoffmann, is there going to be a subsequent conversation to this?

MR. HOFFMANN: I am just inquiring into this.

THE COURT: No, do you represent to me from your own knowledge of the case you are presenting that is one of the issues?

MR. HOFFMANN: I discussed this with my colleagues. I think there was one, but I am not sure

it's fully responsive to the previous conversation.

THE COURT: Because I am prepared to instruct the jury that the statement of this gentleman to representatives of your client is not admitted at this point for the truth of its contents, but merely for the fact it was communicated to them, and the expectation on my part that there was some response on your client's part to that communication.

MR. HOFFMANN: Yes.

THE COURT: Now, I gather that would meet certainly much of your objection.

MR. TUROFF: It would meet some of it, but not all of it. The whole thing is prejudicial.

THE COURT: All right.

MR. HOFFMANN: Your Honor, would you be kind enough to make your ruling subject to later developments in the testimony in the event it has impact on it?

THE COURT: Ladies and gentlemen, I want to say to you this last conversation is not admitted for the truth of anything that is contained in it, but merely for the fact that Mr. Oreck communicated this to Whirlpool and I am taking it subject to ascertaining what response Whirlpool had made, having been told these words. And it is admitted for no other purpose.

Go ahead.

Q I now ask you that question.

Mr. Oreck, was there a response to what you had said in the course of this conversation?

A Yes, sir, there was.

Q And when did that happen?

A Several days later, possibly a week, I received a call from Mr. Sweet wherein he told me that they had decided to renew the contract for approximately three years provided that the contract be renewed for three years effective August 1, which was not in fact the end of the five-year contract, because that would have been March of '69; that he would -- that Whirlpool would agree to renew the contract effective August 1 for three years subject to my signing a release stating that I wouldn't do anything at all.

MR. TUROFF: Your Honor, I have to object again and move to strike. There is an agreement between the parties which has been introduced by Mr. Hoffman -- I believe it's Exhibit 44 in evidence -- which is complete on its face, and any conversations prior to the execution of that agreement are merged into the agreement.

THE COURT: That objection at this point is overruled. This has to do with the circumstances under

which they were negotiating further and it is not a contract term obviously. It is a discussion of what was before then.

Overruled.

Q Was there any more which took place in the conversation you just described?

A No, sir, other than that I thanked him and looked forward to getting the contract which ultimately came.

Q And did you agree to sign a release and proceed with a further contract with Whirlpool?

A Yes, sir, I did.

Q What business alternatives did you have at the time when you made such an agreement?

A I had --

MR. TUROFF: I object, your Honor. The signed agreement is in evidence. It is signed.

MR. HOFFMANN: I asked the man what alternatives did he have. Perhaps he was going to go into the business of --

THE COURT: Hold on a minute. I understand what your question is getting at.

I am going to permit the area, but I am going to sustain an objection to the form of that question.

MR. HOFFMANN: Well, sir, perhaps I should read the letter in first and then talk about the witness' recollection.

I would like to read from the top page of Plaintiff's Exhibit 44 in evidence, a letter from S. E. Sweet, August 1, 1968 to Mr. David Oreck.

(Mr. Hoffmann read from Plaintiff's Exhibit 44 in evidence.)

Q Sir, did you follow the invitation in the last paragraph that I just read to you and give a call to Mr. Sweet after receipt of his letter of August 1, 1968?

A Yes, sir, I did.

Q Is that a conversation which you have described?

A Upon receiving the --

Q I am sorry, let me interrupt you. I asked you the question.

Have you already described this conversation?

A No, I did not.

Q Will you please do so?

A I called Mr. Sweet when I received this new contract and I read it over carefully and I called and I told him that there were several provisions in there that seemed very difficult to me. Among them, I said, were the terms of payment which were so harsh as to cause me

to pay for the merchandise before I received it and, secondly, it limited me to exactly one vacuum cleaner to sell and one attachment. And I said to him, "Sol, you have been in this business a long time. It would be like if I opened up a clothing store and had only one kind of brown suit to sell. I wouldm't have much of a business. And you are limiting me to exactly one model."

I said, "Not everybody wants one."

He said, "Dave, let's save a lot of time. This is the agreement. You're lucky to have it. Sign it as it is and return it by the time I mentioned in the letter or forget it."

So I thanked him and I hung up.

MR. TUROFF: Again I object and move to strike because it is a blatantly self-serving statement. It's irrelevant.

THE COURT: No.

MR. HOFFMANN: Your Honor, the truth is often self-serving.

(Continued on next page.)

T2 Q Did you, in fact, sign the release, Mr. Oreck?

A Yes, sir, I signed the release.

Q Did you consult with your lawyer before signing it?

A No, I didn't consult with a lawyer.

Q Don't you normally consult with lawyers when you take important steps in your business life?

A I do, but in this situation I had no alternative; it was sign it as is, as Mr. Sweet said, or you are out of business, which would have been my position. So it was a moot point. I didn't feel good about it, but I had no alternative.

MR. TUROFF: I object to the last part, his conclusory statement.

THE COURT: Strike it out.

Q Mr. Oreck, did you have any other business to conduct at the point of time when you were asked to sign the release other than continue as a distributor for vacuumcleaners?

* * *

* * *

A No, sir, I had no alternate plans at all. This is what I was doing.

Q Can you tell us what the effect would have been on you if you were forced to terminate your Whirlpool distribution agreement at that time?

MR. TUROFF: I am going to object.

THE COURT: Yes, sustained as to form.

If the agreement had not been renewed, what was your business posture at that point, Mr. Oreck?

THE WITNESS: My business posture would have been a pretty shaky one, because Whirlpool was basically my sole source of supply; it represented 99 per cent of what we sold, and in the absence of that I have no vacuum cleaner business. It would have meant losing a lot; it would have meant great difficulty in collecting our accounts receivable; people don't pay you when they can't get merchandise; it would have been a catastrophe for me.

MR. TUROFF: I have to object.

THE COURT: Strike out the last sentence.

MR. TUROFF: The whole thing.

THE COURT: I will overrule that objection. I will strike out the last sentence.

* * *

Q I would like to show you this agreement, 44 in evidence. Can you tell me what the differences are between this agreement and the earlier agreement you had, which is in evidence as Exhibit 3?

MR. TUROFF: I am going to object to that.

THE COURT: Sustained.

MR. HOFFMAN: Your Honor, the agreements speak for themselves, but someone must call attention to the differences. I will do it, if you will allow me.

In the first agreement, the agreement of August 7, 1963, the first paragraph provides:

"We are pleased to advise that you are hereby appointed an authorized distributor of Whirlpool Corporation (hereinafter called 'Whirlpool') commencing with the effective date of this agreement as provided below and continuing for an initial term ending five years from the date on which Whirlpool shall have completed shipment to you of 500 Products as herein defined or from the date of May 1, 1964, whichever date occurs first, (hereinafter called the 'Starting Date'), such term to be

extended automatically for successive additional terms of one year each, until terminated as hereinafter provided, it being agreed that either party will have the right to terminate this agreement at the end of the initial term or any subsequent one year additional term by giving the other party hereto at least six months' prior written notice of such termination."

In the August 1, 1968, agreement, which is Plaintiff's Exhibit 44, the term is described as follows:

"1. We are pleased to advise that you are hereby appointed an authorized distributor of Whirlpool Corporation (herein called 'Whirlpool') effective on the date of execution by you of this Agreement, and continuing for a term ending December 31, 1971, at which time this agreement shall expire. Your appointment is upon the terms and provisions set forth herein."

And then in this Exhibit 44, August 1, 1968, agreement the definition of product is in paragraph 2:

"While this agreement is in effect, you are authorized by Whirlpool to distribute for household and domestic use, and for light commercial and light industrial use, the following specifically identified

products (hereinafter called 'Products'):

(i) Whirlpool upright vacuum cleaner, Model No. CVR 1000; and (2) attachment hose and electric power brush and nozzle assembly only for Whirlpool cannister vacuum cleaner, Model No. AP8."

With your Honor's leave, I would like the witness to show the jury again those products.

THE WITNESS: This is the upright vacuum cleaner and this is the attachment. These were the two products.

MR. TUROFF: The model he is holding is the CVR 2000 vacuum cleaner, not the CVR 1000 vacuum cleaner.

MR. HOFFMAN: Was there any difference between the two?

THE WITNESS: No, sir.

* * *

MR. HOFFMAN: Now, in the earlier agreement, August 7, 1963, Plaintiff's Exhibit 3, the product is described in paragraph 2:

"While your distributorship is in effect, you are authorized by Whirlpool Corporation to distribute RCA Whirlpool home vacuum cleaners of the portable type powered during use by connection to an ordinary 100-volt

household electrical circuit and offered for sale by Whirlpool (herein called 'Products')."

BY MR. HOFFMAN:

Q Sir, do you know of any limitation in vacuum cleaner types made by Whirlpool enclosed by this paragraph I just read?

* * *

A No, there were no exclusions for vacuum cleaners made by Whirlpool at that time.

Q In the earlier agreement, Plaintiff's Exhibit 3, on page 5, paragraph 9, provision is made for credit terms:

"Credit terms applicable to purchases from Whirlpool will be determined by Whirlpool's Credit Department in Benton Harbor, Michigan. You will pay Whirlpool for all Products ordered by you from Whirlpool at the prices and upon the terms on which each such order is accepted by Whirlpool. In the event your payments to Whirlpool are in arrears, Whirlpool shall have the right to take the following action with respect to your orders if, in the opinion of Whirlpool's Credit Department, such action is necessary to protect Whirlpool's in-

terests:

"(a) Withhold shipments to you; or

"(b) Make shipments to you on any other terms Whirlpool believes are required by the circumstances."

In your later agreement, Plaintiff's Exhibit 44 in evidence, the credit provision is found on page 4:

"You will pay Whirlpool for all Products ordered by you from Whirlpool at the prices and upon the terms of which each such order is accepted by Whirlpool. You will receive invoices for products as they are produced, and you agree to pay Whirlpool for such Products within 10 days after receipt by you of each such invoice."

Sir, what was the practice of the Oreck Corporation in making payments under the first agreement, the agreement of August 7, 1963?

A The terms of payment varied, but they were anywhere from 30 days to 90 days after receipt of the merchandise.

Q Was there any protest from the Whirlpool Credit Department to Oreck taking 30 to 90 days after receipt of the merchandise in order to pay?

A No, we had an occasional dispute brought about by problems beyond our control, but we had no problems in that regard. They never held any shipments up

or anything like that.

Q Was any reason given you for putting in a 10-day provision in Item 11 of the agreement of August 1, 1968?

* * *

A There was no reason given; this was 10 days from the date of manufacture and not from the date of shipment, and no reason was given to me.

* * *

* * *

Q You were at Bruno how long?

A Approximately 17 years.

Q Did you have occasion to enter into contracts under which you bought a quantity of merchandise on behalf of Bruno?

A Yes, sir.

Q Did you have occasion to learn the credit terms of such contracts?

A Yes, sir.

Q Did you, sir, ever see a contract which required payment not after receipt of merchandise, but 10 days after the merchandise was manufactured?

A Never.

MR. TUROFF: Objection, your Honor. It is entirely irrelevant as to what other contracts for other merchandise with other people were. It has no bearing on this case whatsoever and it is blatant hearsay.

MR. HOFFMAN: What he saw is never hearsay.

MR. TUROFF: What he saw in the contract with somebody else?

THE COURT: Gentlemen, come to the side bar.

(At the side bar.)

THE COURT: The objection is based, I take it, noton the fact that he has not been in the field or is aware of agreements, and Mr. Hoffman obviously wishes to draw the attention of the jury that your client imposed terms that were very onerous in the field in order to put certain pressures on him so that he might default?

MR. HOFFMAN: He had no choice, he said.

THE COURT: I understand that. As I say, there is no question here that this man is in a position to give some testimony that this is an unusual credit term.

MR. TUROFF: Your Honor, assuming that it was an unusual creditterm, I don't think he is qualified to speak for all manufacturers of all products.

MR. HOFFMAN: He is not.

MR. TUROFF: I don't think it is probative of anything.

THE COURT: Arguably probative it is.

MR. TUROFF: It is prejudicial. We are having hearsay explanations of unknown terms granted by unknown people and unknown times.

THE COURT: Mr. Hoffman, I am a little bit concerned with the absence of sufficient foundation for this man to testify. It seems to me that the ultimate question is relevant and admissible. Arguably, a credit

term that is never used by anybody else is some evidence of an anti-trust pinch.

MR. TUROFF: Your Honor should also note that the evidence is going to show that this term was never followed.

THE COURT: That may be true. I think you may have to lay a little better foundation.

* * *

* * *

Q Mr. Oreck, when you were at Bruno, New York, will you remind us again what positions you occupied?

THE COURT: No, Mr. Hoffman. In the interest of time why don't you ask him what experience he has had in studying credit terms that are applicable in the appliance field, terms that he has had occasion to look at.

Q Did you hear what the Judge's question was?

A Yes, sir.

Q Will you answer, please?

A I have been in the wholesale appliance business for 30 years and a good part of that time I have been instrumental in ordering merchandise and in much of that time I have been an officer of the companies that I have been with; I have had a considerable amount of experience buying from manufacturers; I do know their terms, or, at least, what is customary in the appliance business, just as I know what is customary in selling to retailers. I feel my experience is very considerable in this particular regard; it is terribly important to someone in this distributing business.

MR. TUROFF: I object to the conclusion.

THE COURT: Strike the last answer.

"Now on the basis of your experience" -- go ahead.

Q Have you had occasion to see any credit terms which require payment within ten days after receipt by the purchaser of an invoice showing manufacture?

A I have never.

* * *

xx (Plaintiff's Exhibit 45 marked for identification.)

MR. HOFFMAN: This is dated June 27, 1966, to J. Sparks, subject: Oreck Vacuum Cleaners; it is from John H. Platts, with copies fo Woolridge and G. Evans.

I offer it in evidence.

* * *

(Plaintiff's Exhibit 45 received in evidence.)

BY MR. HOFFMAN:

Q Mr. Oreck, as of June 27, 1966, what role did John H. Platts play in the Whirlpool Corporation?

A John H. Platts was the president of the Whirlpool Corporation.

Q Do you notice on the second page of Exhibit 45 a copy indication?

A Yes.

Q First, the name J. Woolridge, do you know who he was at that time?

A J. Woolridge was the assistant to Elisha Gray, chairman of the board.

Q Of Whirlpool?

A Of Whirlpool Corporation.

Q And G. Evans, do you know who he was?

A G. Evans was involved in the supervision of manufacture of some sort. I don't know exactly.

Q And the exhibit shows it is addressed to J. Sparks. Who is he?

A J. Sparks was the president of Whirlpool Corporation.

MR. HOFFMAN: If I may, your Honor, I will read the exhibit.

(Mr. Hoffman read Plaintiff's Exhibit 45 to the jury.)

T3 pm

(Plaintiff's Exhibit 46 was marked for identification.)

xx

Q Mr. Oreck, I show you what has been marked as 46 for identification, a copy of a letter from John Payne to you on the date of January 12, 1970. Is this a letter which you received?

A Yes, sir, it is.

MR. HOFFMANN: I offer it as an exhibit, your Honor, Plaintiff's Exhibit 46.

MR. TUROFF: I am going to object, your Honor, because there is something missing from this copy that I have, one of the words here, and I cannot tell what the word is and I believe that we have had some prior discussions about this among counsel and we were unable to determine what the word is.

THE COURT: Which word is this?

MR. HOFFMANN: Would you be good --

MR. TUROFF: In the second paragraph.

THE COURT: The second line?

MR. TUROFF: Yes, "I feel that the" something, unless it's just on my copy. Perhaps I can look at the one --

THE COURT: No, my copy has two or three letters missing in that word.

MR. HOFFMAN: Your Honor, can we save time by asking that you receive the exhibit for all purposes, except for purposes of proof of --

THE COURT: It is perfectly clear that that word has to be "figure."

MR. TUROFF: Well, I --

THE COURT: I don't think anything else makes sense. On the second page he has all kinds of shipments and while you are obviously not bound by anything I am concluding as to that, it seems to me that is obviously what it had to be.

MR. HOFFMANN: Your Honor, will you receive it on my representation that is what it is?

MR. TUROFF: No, I will not take his representation. You didn't write the letter.

MR. HOFFMANN: Please allow me --

THE COURT: I am going to admit the letter and the jury is entitled to draw its own conclusions as to what that word would be and nothing that you or I or anybody else --

MR. TUROFF: They would have to guess.

MR. HOFFMANN: If I find it is not "figure," it is my duty to call it to your attention and I shall promptly do so.

THE COURT: All right, it is received in evidence.

(Plaintiff's Exhibit 46 was received in evidence.)

Q Mr. Oreck, look, if you will, at the second paragraph as to which there is a failure of typing. It looks as if it is "figure."

I shall read it to you:

"While the old franchise is dead and the quantity requirements shown under franchise are obsolete I feel that the figure of total electric cleaners whipped would be important to you as it is to us. It appears that during the month of January, 1970 we will ship the 100,000th electric cleaner into your distribution system. Congratulations on achieving this historic milestone."

Sir, did Mr. Payne, the author of this letter, complain to you at any time during 1970 about Oreck selling vacuum cleaners through the direct mail route?

A No, sir, he did not.

Q Did you have any complaints from him at all during that period of time, that is to say, 1970?

A No, sir, I had no complaints that I recall.

Q When was it that the Oreck Corporation went

into the mail order business?

A We started in the -- initially in the mail order business in 1967.

Q In 1970 was Oreck Corporation selling in any other way than through direct mail?

A Yes, we were.

Q In respect of the quantity of products, about how much was sold by direct mail?

A I would estimate that 90 per cent of our sales were by direct mail, the balance through other channels.

(Plaintiff's Exhibit 47 was marked for identification.)

xx Q Would you be good enough to look at Plaintiff's Exhibit 47. It is dated January 27, 1970, addressed to David Oreck and has "Best personal regards."

Is that in handwriting "Jack"?

A Yes, that's Jack.

Q And who is that Jack?

A That's J. M. Wooldridge, assistant to the chairman and president of Whirlpool Corporation.

* * *

* * *

(Plaintiff's Exhibit 47 was received in evidence.)

xx MR. HOFFMANN: I would like to read it aloud.

(Mr. Hoffmann read from Plaintiff's Exhibit 47 in evidence.)

Q Why all this reference, Mr. Oreck, to 100,000? Does that have any particular significance?

A Well, in the field of marketing 100,000 of any new product is a milestone and is very significant.

Q And is this a reference to your selling 100,000 vacuum cleaners?

A Yes, it is. One generally assumes the marketing field that--

THE COURT: No, the answer is, "Yes, it is."

THE WITNESS: I am sorry, sir.

THE COURT: All right.

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Q Mr. Oreck, at the time you received these congratulatory messages, you were 90 per cent or more in the mail order business. Was that your testimony a moment ago?

A Yes, sir.

* * *

* * *

Q Mr. Oreck, did you from your experience know about the aspects of marketing by direct mail which indicate future success? Do you know what circumstances along the way of selling the products directly by mail can be used by businessmen in making predictions for the future?

MR. TUROFF: Objection to the form of the question.

THE COURT: Sustained.

MR. HOFFMANN: I am asking what he knows, your Honor.

THE COURT: No, it is a question of whether he ever had any experience here in this kind of sales, what he learned from that experience, or had not learned.

Did you ever have sales of less than 100,000 by

direct mail?

THE WITNESS: I have been involved in direct mail.

* * *

* * *

Q Mr. Oreck, when the new agreement was signed in August of '68, what was the principal method used at that time by Oreck in distributing vacuum cleaners?

A By that time we had -- our principal order was the mail order, the field of mail order.

Q And your secondary method, what was that?

A Through the janitorial supply wholesale distributors.

Q Was the fact that you were distributing primarily by mail order known to Whirlpool as of August 1968?

A Yes, indeed it was.

Q How do you know that?

A Well, because I had made numerous -- I had numerous -- I had correspondence and telephone calls relative to the mail orders. They had all received some mail order solicitation.

Q During what period of time did these telephone calls, if I may separate them from the correspondence, take place?

A I would say that the first telephone calls were

in late 1967, soon after we began advertising by mail.

Q Can you tell us the persons making the calls, as best as you can remember, how many persons made such calls?

A Yes. Mr. John Payne called me in late '67, I would say, relative to our mailing.

Q What did he have to say about it?

MR. TUROFF: I object to the conversation on the grounds of the time period.

THE COURT: Overrued.

Go ahead.

A Mr. Payne told me in his initial call to me relative to mail orders that some people around his place had received the mail and he told me that I ought not to rock the boat, were his words. He suggested that we should not do mailing because the people didn't like it.

Q You used the word "people." What does that mean? Was he more specific than that?

A Well, he used the term "other customer" was the way he referred to the other customer.

Q By the "other customer" --

THE COURT: No, no, no, no, Mr. Hoffmann.

MR. HOFFMANN: I won't say it.

THE COURT: All right.

Q Did you have any conversations with other Whirlpool officials concerning this subject matter?

A Yes.

Q Will you tell us about when that happened, during what period of time?

A During about the same period of time.

Q Which is again what?

A Which is again I believe late in 1967 Mr. Jack Wooldridge called me relative to our mailing.

Q What did he have to say? Or better than that, what did he say to you and what did you say to him?

A Mr. Wooldridge told me that Whirlpool people were distressed with my mailin.

I said to him, "Jack, I don't know why they should be distressed, and for what it's worth our initial results look very promising, sales results."

And he said, "Well, I wish you would think about it."

He may have said a few things after that, but that was the essence of it.

Q Any other conversations in this period that you can think of now?

A Well, I did talk about to Mr. Wooldridge. He did call me again about this.

Q About when did that happen?

A I would -- to the best of my recollection, it was in late '67 or early '68, as far as I can remember, right in that period, I believe.

Q Do you remember what he had to say?

A Well, he asked me if I wouldn't make a number of changes in my mail order letter. As long as I wouldn't stop, he said, then there are some things he wanted me to do or not do, more appropriately.

Q And did you reach agreement with him as to what you would do?

A Yes, sir, I did.

Q These changes you speak of, were they as to the text or content of the mail order solicitation?

A They related to the use of certain words. He would ask me if I wouldn't delete word number -- a word and using something else or not say this or do say that.

Q Can you tell us, Mr. Oreck, without reference to records, how many vacuum cleaners Oreck sold in the years of its new contract starting in 1969?

A In 1969 we sold 27,450 vacuum cleaners.

Q How about 1970?

A In 1970 we sold 40,000 vacuum cleaners.

Q And '71?

A In 1971 we sold 78,500 vacuum cleaners.

Q Do you have any explanation to give us for what appears to be about a 50 per cent increase in sales from 1970 to 1971?

MR. TUROFF: I object, your Honor. It simply calls for his conclusion. The figures show whatever he sold and that is what he sold. His conclusion as to why he sold them is totally irrelevant and immaterial and they are simply calling for a self-serving statement of this witness.

THE COURT: I am going to overrule that objection. I take it it has to do with facts -- certain facts having to do with marketing or in marketing approaches rather than statements of his intention. If it doesn't do that, then I will consider striking it out.

The objection is overruled.

Q Do you have the question in mind, Mr. Oreck?

MR. HOFFMANN: Your Honor, would you be kind enough to let the reporter read it back to him -- the question?

THE COURT: Well, can I phrase it for you?

To what do you attribute the increase from 40,000 to 78,000 in the year as between '70 and '71,

Mr. Oreck?

THE WITNESS: Yes, your Honor.

THE COURT: All right.

THE WITNESS: We had finally discovered the formula for success which embraced many things. First of all, doing the right thing long enough sometimes to pay off. You begin -- if you dig deep enough sometimes you hit oil.

We -- our mailing was very effective. We determined the type of mail that produced the best results. Our service technique was very much superior.

The product itself -- we had finally ironed ou the defects in the product to an extent where they stayed sold and so we began to get some recommendations from people who bought these machines. It had a contagious effect. Momentum was beginning.

We did accelerate our total advertising budget as well and when we found it was working, why, we accelerated our efforts.

We instituted a policy of immeidate delivery which is important in the mail order business. The same day the order was received, if people had to stay till midnight, they shipped it out. So this, too, -- we got letters from customers who recommended to others on

the strength of the fact you delivered immediately, which was unique in the mail order business.

People who were buying from us would send us the names of their friends and addresses of their friends and say, "Send us some of your literature, this is a good thing."

So when you put all of those things together, the momentum was just really building up tremendously.

MR. TUROFF: I object and move to strike.

THE COURT: Overruled.

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* * *

BY MR. HOFFMAN:

Q Mr. Oreck, I show you 50 for identification. You notice that it is dated May 2, 1969, and it is addressed to Mr. John Payne from yourself, and that there are two letters attached to it, the first one, a letter dated November 14, 1968, addressed to Ozite Corporation from a Mrs. William A. Wilson, and the second from the Ozite Corporation to Mrs. William Wilson, and the date December 3, 1968.

Those letters, that of Mrs. Wilson and that of the Ozite Corporation, are referred to in the postscript on the top letter, that is to say, your letter of May 2, 1969, to Mr. John Payne?

A Yes, sir, they are one and the same.

MR. HOFFMAN: If your Honor please, I offer Plaintiff's Exhibit 50 in evidence, together with the attachments.

MR. TUROFF: I have no objection.

THE COURT: Received.

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(Plaintiff's Exhibit 50 received in evidence.)

MR. HOFFMAN: I will read it, if I may:

This is on the leterhead of the Oreck Corporation, dated May 2, 1969, addressed to Mr. John Payne, Whirlpool Corporation, 850 Arcade Street, St. Paul, Minnesota:

"Dear John:

"Confirming our discussions here in New Orleans, we will accept the substitute for our Model AP18 to be produced later this year."

BY MR. HOFFMAN:

Q Was such a model produced, a substitute model for the Model AP18?

A Yes.

Q Did you, in fact, buy such a substitute model from Whirlpool?

A Yes, sir.

(Mr. Hoffman continues reading from Plaintiff's Exhibit 50 to the jury.)

MR. HOFFMAN: (Continuing reading) "I refer specifically to the asymmetric shape of the cleaning head."

Q Was that provided in the substitute model?

A No, sir.

Q What was the shape or design of the model, the substitute for the AP18?

A It was a rectangular-shaped model.

Q Was it creating difficulty for Oreck in merchandising the substitute model?

MR. TUROFF: I object as conclusory.

THE COURT: Yes, sustained as to form.

(Mr. Hoffman continued reading to the jury from Plaintiff's Exhibit 50 in evidence.)

BY MR. HOFFMAN:

Q Mr. Oreck, was it the CVR1000 Whirlpool vacuum cleaner that Whirlpool was making that you were selling?

A Yes, sir, like that upright (pointing).

Q What business was Ozite in, Mr. Oreck?

A The Ozite Corporation is in the carpet business.

Q Is it a manufacturer?

A They are a manufacturer of carpeting.

MR. HOFFMAN: I would like to read the letter which is attached from Ozite to Mrs. William Wilson.

(Mr. Hoffman continued to read from Plaintiff's Exhibit 50 in evidence to the jury.)

Q Was this endorsement from Ozite an endorsement which had been obtained by your efforts?

A Yes, it was.

Q Tell us about that.

A We had been visiting, I personally had visited the

Ozite Corporation for two years prior to this, as early, I believe, as 1966, two years, at least, demonstrating our product, working with them in their lab, going to the vice-president, in fact, I think the president of the company, showing them how this product would do a good job on their carpet, and what is seen here is typical of letters that they sent out to customers who had a problem; they recommended the RCA Whirlpool vacuum cleaner and no other vacuum cleaner, to my knowledge, to use on their product.

Q Were you able to obtain endorsements from other manufacturers, endorsement for your Whirlpool vacuum cleaner that you were selling?

A I did not receive from any other manufacturer such an unqualified endorsement as the Ozite people used. I did, however, demonstrate our cleaners to other carpet manufacturers, and I do know for a fact that many of the principals in those carpet manufacturers used our cleaners and did recommend them, but this unqualified endorsement of the kind that Ozite put out, they were the only ones I was successful in getting that from.

xx (Plaintiff's Exhibit 51 marked for identification.)

BY MR. HOFFMAN:

Q Mr. Oreck, 51 for identification appears to be

a copy of a letter from you to Elisha Gray and Jack Sparks of Whirlpool under date of September 15, 1969. Is this a letter that you sent to those gentlemen?

A Yes, I sent this.

Q Attached to that is the memorandum dated July 2, 1969, on paper containing the logo of the American Telephone & Telegraph Company.

Is that second page that which we refer to in the letter which is from you to Gray and Sparks under date of September 15, 1969?

A Yes, that is the letter from AT & T I referred to.

MR. HOFFMAN: I offer this as Plaintiff's Exhibit 51.

MR. TUROFF: No objection.

xx (Plaintiff's Exhibit 51 received in evidence.)

(Mr. Hoffman reads from Plaintiff's Exhibit 51 to the jury.)

BY MR. HOFFMAN:

Q Sir, the reference to the recommendation from AT & T being based on tests of your equipment, did you have anything to do with AT & T conducting such tests?

A Yes, indeed.

Q What was that?

A I sent our sales representative in to them on several occasions, gave them samples to test, worked along with them, and the net result of that work was this letter to all of their plants.

Q Did you, Mr. Oreck, receive any acknowledgment from Mr. Elisha Gray or Mr. Jack Sparks, who were the recipients of Plaintiff's Exhibit 51?

A I do not remember whether they acknowledged this specific piece of correspondence in writing. I know Mr. Sparks did call me and congratulate me.

Q This was in connection with getting the AT & T endorsement?

A It was in connection with the AT & T endorsement and the fact that we had such a banner sales month.

Q Now, sir, were there any other promotions you can remember which resulted in acceptance of this machine by specially important large users?

A Yes, sir, one in particular --

MR. TUROFF: Your Honor, I have to object. I don't know where we are going with this. The figures speak for themselves as to what Mr. Oreck or the Oreck Corporation sold and what he did to achieve that. That he worked hard or whatever he did does not go to this.

THE COURT: Overruled.

A We had been working with the purchasing agent of Loew's Hotel chain, and as a result of a great deal of work with him, putting units in the hotels to use, the Loew's Hotel chain made the RCA-Whirlpool vacuum cleaner standard equipment in all of the Loew's Hotels all over the United States. This was extremely helpful, because it opened the door for getting other institutions like that. The first hotel was the Americana Hotel here in New York, and then all the rest of the Americana chain put them in.

xx (Plaintiff's Exhibit 52 marked for identification.)

MR. HOFFMAN: This document is from Mr. John Payne, contract manager of Whirlpool, addressed to David Oreck, under date of May 15, 1969. I offer it in evidence.

MR. TUROFF: I have no objection.

THE COURT: Received.

xx (Plaintiff's Exhibit 52 received in evidence.)

(Mr. Hoffman read from Plaintiff's Exhibit 52 to the jury.)

BY MR. HOFFMAN:

Q Mr. Oreck, who is the Marsh referred to in this

letter?

A My brother, Marshall Oreck.

Q What is his function in your corporation?

A He is the operations manager of the company.

Q Did he hold that post as of May, 1969?

A Yes, sir, he did.

Q Can you tell us, Mr. Oreck, whether the progress referred to in 52 continued after 1969?

A Yes, it did, if you are referring to the sales progress.

Q Yes, indeed.

A Yes, it certainly did.

Q Was the sales progress, to use that phrase, maintained in to 1971?

A Yes, it certainly was.

Q Addressing yourself to the exhibit, were you informed, Mr. Oreck, as to the factors leading Whirlpool to discontinue the current Model AP18?

A Yes.

Q What was that?

A John Payne told me that they had to discontinue the AP18 because the tools were wearing out.

Q Do you know what tools were wearing out? What the reference was to?

A He was referring to the casting, the mold, the cover that houses the motor, the mold that is made from. He was referring to that mold, where we made the die cast aluminum head.

Q Do you know what it required to make new tools to replace the ones you just described?

A Yes, I do.

Q What is that?

A It is quite easy to make a new mold from an existing mold, because of the fact you do not have to re-engineer as if from starting from scratch. The cost of making a new mold depends, of course, on the complexity of the mold itself. I was told that to update this mold, that is, to give us a new one, the cost would be a few thousand dollars, not a significant amount of money compared --

MR. TUROFF: I object and move to strike it. I also don't know who told him what.

THE COURT: Who told you this?

THE WITNESS: I was told this by John Payne at Whirlpool.

Q Can you tell us approximately how many AP13s were sold by Oreck Corporation in the year preceding this letter?

A I would have to think about that, Mr. Hoffman. I don't know exactly.

Q Can you tell us approximately how much money was made off the AP18 in the period of a few months preceding the letter? Or any period of time or configuration of time that you can remember?

MR. TUROFF: I am going to object to that. I don't think it is proper.

THE COURT: I think the question is a little broad in form.

MR. HOFFMAN: I will not go along that line at this time.

I ask that this be marked Plaintiff's Exhibit 65 for identification.

xx (Plaintiff's Exhibit 65 marked for identification.)

Q I show you, Mr. Oreck, Plaintiff's Exhibit 65 for identification. You notice that the signatory is B.L. Riehm?

Does that name mean anything to you?

A No, that doesn't mean anything to me.

Q The recipients are John Payne and Gene Gardner?

A John Payne is known to me, but Gardner's is not at this moment.

Q John Payne was --

A He was in charge of contract sales for Whirlpool.

Q Does R. Gorman mean anything to you?

A Mr. Gorman was a Whirlpool employee at St. Paul, but I don't recall his position.

MR. HOFFMAN: Your Honor, this document was submitted to us by our adversary and I offer it in evidence.

* * *

xx (Plaintiff's Exhibit 65 received in evidence.)

(Mr. Hoffman reads to the jury from Plaintiff's Exhibit 65 in evidence.)

* * *

* * *

Q Did Whirlpool in fact sell to Oreck a different Power attachment to replace the AP-18?

A Yes, sir.

Q And what was that called?

A It was called the CAP-33.

Q And what sort of machine was it? How would you describe it?

A It was a rectangular-shaped power head, somewhat smaller than the previous one. It did not have a head-light as did the AP-18.

Q Was this a new design?

A No, sir.

* * *

Q Well, the model was sold to you by a number,

was it?

A Yes, sir.

Q And what was that?

A It was sold to us as Model CAP-33.

Q And do you know whether Sears offered for sale a power attachment which had the same or almost identical qualities of the CAP-33?

A Yes, I know that.

* * *

(Plaintiff's Exhibit 55 was marked for identification.)

Q Mr. Oreck, you have in your hands Plaintiff's Exhibit 55 for identification. Can you tell us what

xx

it is?

A This is a letter I sent to Elisha Gray, II, president, then chairman I believe of the Whirlpool Corporation, Benton Harbor, Michigan.

Q The exhibit for identification consists of three pages. The last two -- can you describe what they are?

A Yes, page No. 2 is a written report, a capsule of our progress in the past eight years, an eighth anniversary report, as is dated here, and the third page is a graph that I sent to him. The graph was prepared in part by Whirlpool and in part by me.

Q Sir, did you report to Mr. Gray from time to time as to what the Oreck Corporation was doing in selling vacuum cleaners?

A Yes, sir, I did.

* * *

* * *

THE COURT: So 55-A is admitted only to the extent of the year 1971 and in some way we will to have to deal with it however we consider appropriate.

55 is received to the extent of the first two pages. There happens to be a projection in 55, page 2, sales estimates of 1971, but given the fact the witness testified 78,500 units were sold in that year I do not deem it appropriate to exclude that limited estimate.

* * *

jwp

Oreck - Direct

* * *

Q Is the CAP 33 attachment in the courtroom today?

A Yes, it is.

Q Would you be good enough to take a look at it? Would you please show it to the jury anddescribe it for us, please?

A. This is a motorized attachment whereby the electri motor driven brush here is driven by a small motor in here. The suction is provided by a cannister such as that so that the suction comes from another motor and the revolving brush

works with the motor inside here and it thus becomes a two-motor cleaner. This attachment with the cannister is a two-motor vacuum cleaner.

Q Is the Kenmore 7780 here in court?

A Yes, sir, it is. This is the Kenmore model.

Q Would you describe that, please?

A This also, like this one, is a motorized attachment that goes with the cannister like this one. It, too, has an electric motor driven brush driven by a small motor here. They are both exactly the same size.

Q May I please see it? I notice on the bottom that it says, "U.L. Sears, Roebuck & Company, Kenmore," and then Simpson-Sears, Ltd."

Can you describe the significance of Simpson-Sears, Ltd.?

MR. TUROFF: I am going to object, your Honor. What kind of a question is that?

MR. HOFFMAN: A good one, I thought.

THE COURT: I thought we already had that Simpson-Sears is a Canadian outlet of Sears Roebuck.

MR. TUROFF: I don't think that is quite the evidence. What he said was that Sears Roebuck has a stock ownership interest in Simpson-Sears together with another department store chain.

THE COURT: I see. All right.

MR. HOFFMAN: Your Honor, I would simply like the witness to tell us whether the fact that there is an imprint of Simpson-Sears on the bottom of this, on the base, has any significance that he knows of.

MR. TUROFF: I object. I don't think he is qualified.

THE COURT: What is the basis for alleging the significance of it?

MR.HOFFMAN: He has been selling vacuum cleaners both in Canada and in the United States, and I am content if it is simply known what Simpson-Sears is, but it is imprinted on the base --

THE COURT: Let's go forward. That is your contention.

MR. HOFFMAN: All right.

BY MR. HOFFMAN:

Q You testified yesterday, Mr. Oreck, that the CAP-33 was substituted for the AP-18?

A Yes, sir.

* * *

* * *

Q Mr. Oreck, did you have any conversation with representatives of Whirlpool concerning the substitution of CAP-33 for AP-18?

A Yes, sir, I did.

Q Tell us as best you can recall what they were, starting with when they took place.

A In 1967, about the middle of the year, I believe, I talked to John Payne relative to the AP-18 model attachment that he had advised me that the tool life was limited, and I told him at that time that the AP-18 was vital to

our merchandising program and if it required new tooling then by all means we should do that.

Q And what response, if any, did Mr. Payne make to you?

A He said that he would take that up with the powers that be. He certainly understood my wishes.

Q Did you have any other conversations with the Whirlpool representatives concerning this matter of the substitution after it took place?

A After it took place?

Q Yes.

* * *

A In May of 1968 I wrote to John Payne, which was following the telephone coversation we had, and I told him that -- he had mentioned to me in this telephone conversation previous to my writing him that they were about to make a substitution and I wrote him a letter at that time -- I believe it was in May, '68 -- and I told him that I wanted to be certain that the substitution he made was to be of the asymmetric design similar to what we had been selling.

Q Is the letter to which you refer that which is already an exhibit in this case as Plaintiff's Exhibit 52?

A (Examining) This is not the letter that I wrote to him.

Q Well, sir, I show you Plaintiff's Exhibit 52.

A Yes, that's it.

Q Does this have any connection with what you were just talking about?

A Well, yes.

Q Is this a reply to your letter?

A Yes.

* * *

Q In any event, sir, let me take the exhibit away from you.

Is there anything further that you recall here and now having to do with your conversations with Mr. Payne concerning the subject matter of the substitution?

A Sir, I talked and wrote to Payne relative to my wishes and the ultimate result was that --

MR. TUROFF: I am going to object.

A -- I got this model.

MR. TUROFF: And I move to strike.

THE COURT: Well, it is a matter really of form, is it not? The substance is admissible.

MR. TUROFF: Yes, the ultimate result. That is calling for a conclusion of the witness.

THE COURT: I will permit it.

What finally happened?

THE WITNESS: What finally happened is he gave me what he wanted.

MR. TUROFF: I object to that, your Honor, and move to strike, "He gave me what he wanted." That is not competent.

THE COURT: Yes, strike it out.

T2 am

Q Is that what he said, sir?

A Mr. Payne told me that Whirlpool had made the decision to give me the CAP-33 and felt it was the only prudent decision to make.

Q Thank you.

A Even though he knew what I wanted.

MR. HOFFMANN: I am going to hand the clerk Exhibit 75 for identification.

(Plaintiff's Exhibit 75 was marked for identification.)

xx

Q I show you 75 and ask you if you can tell us what it is?

A This is a meeting report of -- sent to me by Whirlpool Corporation signed by John D. Payne, products manager, and it details --

Q That is all I want from you, sir.

MR. HOFFMANN: I offer it in evidence.

MR. TUROFF: No objection, your Honor.

THE COURT: Received.

(Plaintiff's Exhibit 75 for identification was received in evidence.)

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(Mr. Hoffmann read from Plaintiff's Exhibit 75 in evidence to the jury.)

Q Do you know what OTM-2469 is?

A That is a Whirlpool designation of production runs and it doesn't mean anything to me.

(Mr. Hoffmann continued reading from Plaintiff's Exhibit 75 in evidence to the jury.)

MR. HOFFMANN: Your Honor, in face of the admission in the report which states that reluctantly Mr. Oreck agrees to discontinuance of AP-18, may I now ask the witness whether or not he willingly accepted it?

THE COURT: I thought I had suggested that there were other ways to get that proof that were competent and you have done so.

MR. HOFFMANN: All right.

Q Mr. Oreck, in terms of your business judgment, which of the products, that is to say, the AP-18 or the CAP-33 was better for your sales purposes?

* * *

A The AP-18 was far better for my sales purposes.

Q Can you state the reasons for that?

A Yes, sir. There are several reasons. The principal ones:

No. 1, the AP-18 has a unique design different from anything else that was on the market. More specifically, it was different from the Sears model that I was competing against.

MR. TUROFF: I am going to object to that characterization, "Sears model that I was competing against."

THE COURT: Yes, strike that out, please.

Q What was the Sears model to which you were competing against?

MR. TUROFF: Pardon?

MR. HOFFMANN: I asked what was the Sears model. It's a different question.

MR. TUROFF: May I have the question read, please? I didn't hear it.

THE COURT: I may have been too hasty in that. I am going to reverse myself.

That answer may stand.

MR. TUROFF: May I be heard on that, your Honor?

THE COURT: No. I will hear you at the side bar at some later point. The answer has been given. I will hear you later as to whether I should reverse myself a second time.

Go ahead.

A I was competing against the Sears Power Mate model I believe it's 8420, 8840.

Q Is it this model I hold in my hand?

A Yes, it is. That model number is on the bottom, 8440 or 8420.

Q Perhaps you can see it.

A Correction, 7880 is what it is, Power Mate they call it. That's what I was competing against.

* * *

Q Do you have any other reason you wish to advance as to why this design was needed in competiton iwth the Sears model?

A Well, sir, there were two reasons basically. The first was the one I stated, that it was a different looking product, which was appealing.

The second reason was as a result of a substantial amount of advertising we had done on that unique design, I had orders pending for approximately 35,000 units.

* * *

MR. HOFFMANN: Mr. Dorsa, 63 for identification.

(Plaintiff's Exhibit 63 was marked for identification.)

xx Q I show you what has been marked as Plaintiff's Exhibit 63 and ask if you have ever seen that document or a document of which this is a copy before?

A Yes.

Q What is it, sir?

A This is a copy of the Consumers Union article on vacuum cleaners of March 1967.

Q I ask you to address your attention to the bottom, the legend on the bottom which appears on every second page of this which says Consumer Reports.

A Consumer Reports, yes.

Q Is that your testimony, that this is from a magazine called Consumer Reports?

A Yes, Consumer Reports, which is part of Consumers Union.

* * *

* * *

(Plaintiff's Exhibit 63 for identification was received in evidence.)

(Mr. Hoffmann read from Plaintiff's Exhibit 63

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in evidence to the jury.)

* * *

Q Do you know whether or not this report had any impact on the sales?

A Yes, it does.

Q How do you know that?

A The Consumers Reports magazine is widely followed by purchasers, and dealers are quick to stock and display those items that receive favorable ratings in this publication.

After this article appeared and, if my memory serves me right, ours was pictured on the front cover, I believe, we received many calls from stores who had not only handled the machine previously and, more important,

we received inquiries from Rex-Air, Airway, Dustex, Triple S, McKesson & Robbins, I believe. All of these were people who were in the vacuum cleaner business, many of whom we had previously solicited without success, who called us and expressed an interest --

* * *

T3

Q Had you received any calls from the so-called prospective customers prior to the article appearing?

A To the best of my recollection, we solicited these people, but without success.

Q In talking with you did any of them make any reference to the circumstance that they had seen this article in consumer reports?

* * *

A I can't say for sure at this time that they specifically mentioned that.

THE COURT: All right, that is an answer.

xx

(Plaintiff's Exhibit 64 marked for identification.)

Q Mr. Oreck, I show you 64 for identification. Is this a document which you have seen before?

A Yes, sir, it is.

Q It is addressed to you. Did you receive it?

A Yes, I received it.

Q On the second page there is Oreck to John Payne under date December 13, 1968.

Do you know why that is attached to the Payne to David Oreck communication of December 20?

MR. TUROFF: I object to this question.

MR. HOFFMAN: If you do, sir, I will state for the record that we have attached to the December 20th the December 13th letter to Payne and a reply, what appears to be a reply from Payne to Oreck, and that is all I was seeking to having identified.

MR. TUROFF: Very good.

THE COURT: Any objection?

MR. TUROFF: No objection, your Honor.

THE COURT: Received.

xx (Plaintiff's Exhibit 64 received in evidence.)

MR. HOFFMAN: December 13, 1968, Oreck to John Payne of Whirlpool.

(Mr. Hoffman read from Plaintiff's Exhibit 64 in evidence.)

MR. HOFFMAN: And then the reply, December 20, 1968, from John Payne to David Oreck.

(Mr. Hoffman read from Plaintiff's Exhibit 64 in evidence.)

MR. HOFFMAN: And then there is a footnote.

(Mr. Hoffman read from Plaintiff's Exhibit 64 in evidence.)

MR. HOFFMAN: The exhibit in evidence numbered 44 contains paragraph 9. That is the agreement between the Whirlpool Corporation and Oreck, paragraph 9, to which there is reference to the letter, Exhibit 4.

With your Honor's consent, I would like to read paragraph 9.

(Mr. Hoffman read from Plaintiff's Exhibit 44 in evidence.)

Q Mr.Oreck, did you ask anyone at Whirlpool to replace those worn-out tools?

A Yes, I did.

Q When did you do this?

A When I was first told by Payne, as evidenced by this correspondence, that the tools were going out, I said, "Well, let's replace them."

Q To whom did you say that?

A I said that to John Payne.

Q And did he --

A I reminded John Payne it was the only model in my franchise.

MR. TUROFF: The question is, when did you say

that?

THE WITNESS: I told him that the latter part of 1968.

I wrote to him following a visit that he had to New Orleans. I can't remember the exact date, but I seem to recall it was in early '69, and told him I wanted tooling on that model, or one that looked very much like it.

* * *

Q Go ahead. Have you finished your answer?

A Yes, I believe I have.

Q Did Mr. Payne respond to what you told him? Did he state a position about it?

MR. TUROFF: May we have a time, your Honor? He is mixing up letters and conversations.

THE COURT: I take it this is the same general time?

MR. HOFFMAN: Yes, your Honor. May we have a time in connection with the last question?

THE COURT: Please put your question. I am sustaining your position. These little delays cost us

more time than the taking of testimony.

MR. HOFFMAN: Yes, indeed.

THE COURT: Did you get a letter from Mr. Payne on this subject?

THE WITNESS: I wrote to Mr. Payne following a visit to New Orleans which I would say was in early '69. He visited, I believe, with Mr. Sweet. And I wrote in that letter -- and I think it was in May -- "Please in retooling stick to the design that we have been running, the asymmetric design."

Up until I received a note, one of these letters from him, I was of the assumption from my discussions with him that that's what they were going to do.

MR. TUROFF: I object to his assumption.

THE COURT: Strike that. Strike the assumption out.

THE WITNESS: Sorry.

THE COURT: Did he receive the letter, Mr. Hoffman?

Q Is this the letter you received?

A Yes.

MR. HOFFMAN: I put it in evidence, your Honor. This is Exhibit 50.

Q Is this letter the letter you were referring to?

jwp6 Oreck-direct

A Yes, this is what I was referring to.

* * *

xx (Plaintiff's Exhibit 66 marked for identification.)

Q I show you 66. Can you tell us what it is?

A This is a letter from Whirlpool Corporation, dated April 3, 1968, addressed to me, signed by S.E. Sweet, Director, Residential and Commercial Department of Whirlpool.

MR. HOFFMAN: I offer it in evidence, your Honor.

* * *

THE COURT: Received.

(Plaintiff's Exhibit 66 received in evidence.)

MR. HOFFMAN: 66 is a letter from S.E. Sweet, Director of Residential & Commercial Department, to David Oreck, dated April 3, 1968.

(Mr. Hoffman read from Plaintiff's Exhibit 66 in evidence.)

BY MR. HOFFMAN:

Q Now, sir, after April 3, 1968, did you continue to purchase Model AP-18 from the Whirlpool Corporation?

A Yes, sir.

Q For how long a period of time?

A We continued to purchase it as long as it was available, which was certainly all of that year.

Q Was it available in '69?

A It became unavailable some time early in '69, if my memory serves me correct, or late '68 possibly.

* * *

Q Sir, 66 refers to an increased price. Was an increased price imposed some time after April 3, '68, on the Model AP-18?

A Yes, it was.

xx

* * *

* * *

Q Sir, did you ever have any conversation with representatives of the Whirlpool Corporation concerning the manner of payment for new tooling which might result in continuation of AP-18?

A No, sir.

Q Has the practice been in the past that the Whirlpool Corporation pays for the tooling used by Oreck?

* * *

A Changes were made in products that involved new tooling. It was the new procedure --

THE COURT: Mr. Oreck, so the jury and I are fully aware what we are talking about, what are you talking about when you say "new tooling"?

THE WITNESS: In order to make most of these components on any piece of equipment you need a tool to do it, a machine tool or a die -- in the case of the cover on there, that's die-cast aluminum -- you need a mold to do that. And molds and tools are the things which you form the metal with, or it could be plastic, for that matter, too. So you need these things to form the metal into the shape you want it.

THE COURT: That is categorically what is called new tooling, is that it?

THE WITNESS: Yes, I would say that was the simplest way.

THE COURT: All right. Go ahead.

What was the practice with regard to Whirlpool as to who was to pay for the new tooling on new vacuum cleaner items?

THE WITNESS: It was done two ways, but basically the changes that I asked for that involved new tooling, where there was an expense involved, they would tell me how much that was going to cost and we would amortize it on the basis of so much per unit.

They might say, "Look, this is going to be $5000 to make this change and we will charge you $1 each extra until that is paid for." That would be --

* * *

MR. HOFFMAN: Your Honor, I offer 70 in evidence.

* * *

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(Plaintiff's Exhibit 70 received in evidence.)

MR. HOFFMAN: 70 is to J.M. Woolridge, dated December 16, 1968.

(Mr. Hoffman read from Plaintiff's Exhibit 70 in evidence.)

(Plaintiff's Exhibit 77 marked for identification.)

BY MR. HOFFMAN:

Q Mr. Oreck, I show you Plaintiff's Exhibit 77 and I ask you if you can tell us what it is.

A This is a telegram sent to John Payne of the Whirlpool Corporation, signed by myself, and a second telegram sent to Bill Holder, also at that time with Whirlpool Corporation, who was the boss of that plant at St. Paul.

Q What is the date of the telegram?

A June 9, 1970, in both cases.

Q Do you recall having sent the telegram reflected by Plaintiff's Exhibit 77?

A Yes, I recall it.

MR. HOFFMAN: I offer it in evidence.

MR. TUROFF: Objection, your Honor. It is self-serving and conclusory.

MR. HOFFMAN: Your Honor, could I --

THE COURT: Well, is there going to be some way to tie it to some response?

MR. HOFFMAN: Yes, I will ask the witness what was the response.

THE COURT: What was the response to this? I won't consider the admissibility unless there was a response.

MR. HOFFMAN: Your Honor, might I point out in this context if there had been no response it might have been more eloquent evidence than if there had been.

THE COURT: Not necessarily. You had some problem.

MR. HOFFMAN: Do you wish me to examine on the voir dire?

THE COURT: Yes, please.

Q Mr. Oreck, did you receive any response to

your telegram of June 9, 1970?

A Yes, Mr. Payne called me.

MR. HOFFMAN: I offer it now.

THE COURT: What did he say?

THE WITNESS: He told me that they were working on the problem; that they had had difficulties getting UL approval, or some such thing, and that he was sorry about it.

THE COURT: I admit 77 in evidence.

xx (Plaintiff's Exhibit 77 received in evidence.)

MR. HOFFMAN: 77 is the telegram from David Oreck to John Payne, June 9, 1970.

(Mr. Hoffman read from Plaintiff's Exhibit 77 in evidence.)

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Q Mr. Oreck, can you tell us who is Mr. Bill Holder?

A Mr. Holder was the plant manager at Whirlpool's manufacturing facility in St. Paul where these vacuum cleaners were made.

Q Did Mr. Holder reply in any way to this telegram?

A Not that I recall.

* * *

MR. HOFFMANN: Mr. Dorsa, Plaintiff's 78 for identification.

(Plaintiff's Exhibit 78 was marked for identification.)

xx Q I show you 78 and ask you if you can tell us what it is?

A This is a trip report from Whirlpool Corporation Contract Sales Division signed by John D. Payne, product manager of contract sales for Whirlpool.

Q Were you present at the meeting referred to in the report?

A Yes, I was.

MR. HOFFMANN: I offer it in evidence, your Honor

* * *

(Plaintiff's Exhibit 78 for identification was received in evidence.)

xx (Mr. Hoffmann read from Plaintiff's Exhibit 78 in evidence to the jury.)

Q Mr. Oreck, does this document correctly report that you had made an inquiry about building a non-Whirlpool brand cleaner?

A Yes.

Q What's meant by that non-Whirlpool brand cleaner?

A It would mean that the Whirlpool would produce the cleaner, but rather than putting their own name on it, they would put another name on there, and that's called private label.

Q Was this the first time in your dealings with Whirlpool that you had raised the possibility of selling the Whirlpool product under a private label?

* * *

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A No, sir, I had requested this of Sol Sweet.

MR. HOFFMANN: Mr. Dorsa, Plaintiff's 79 for identification, a copy of letter Sweet to Oreck dated August 9, 1968.

(Plaintiff's Exhibit 79 was marked for identification.)

xx

* * *

(Plaintiff's Exhibit 79 for identification was received in evidence.)

xx (Mr. Hoffmann read from Plaintiff's Exhibit 79 in evidence to the jury.)

* * *

* * *

Q At August 29, 1968, at the time of the Sweet letter to yourself, had you had any dealings with customers who requested a private label vacuum cleaner?

* * *

THE COURT: The objection is overruled.

A Yes.

Q Can you tell us who those customers were?

* * *

* * *

A Rex-Air, Airway, Dustex, Triple S.

Q What business was Rex-Air? What line of business was Rex-Air?

A Rex-Air is in the business of manufacturing and selling vacuum cleaners.

Q What is Airway?

A Airway is in the business of manufacturing and selling vacuum cleaners.

Q How about Dustex?

A Dustex is in the business of leasing chemical pads and doormats, things of that sort, and they sell other products along with it.

MR. TUROFF: Your Honor, now that the witness has identified the customers, alleged customers and what they do, I move to strike all of that and the preceding question on the grounds it obviously has nothing to do with this case.

THE COURT: Let's defer ruling on that. I will reserve decision on that.

You may renew that at a later time.

* * *

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* * *

Q Now, sir, I ask you after your first conversation which you described a few minutes ago concerning getting Whirlpool to make a private label for vacuum cleaners, did you have any subsequent conversation concerning this with representatives of Whirlpool?

* * *

* * *

THE WITNESS: I believe -- would you repeat the question?

(Read.)

A Yes, I did.

Q With whom was the conversation?

A I discussed this with John Payne and I discussed it with him in the latter part of 1968.

Q Where did the conversation take place?

A The conversation took place over the telephone. I called him.

Q Tell us as best you can what you said to him and what he said to you.

A I called John and I said, "I have an order in hand from Rexair. They are buying the product and pasting their label over your name. It would save them a lot

of money, they told me, if they didn't have to do that. Furthermore," I told Mr. Payne, "the units that Rexair has purchased from me, they were returning the hose and the tools which they did not need because they were using their own. I would like to have from you a price on just the unit with their name on it, with no hose and no tools and, in fact, if you can't put their name on it, just omit any name. They want to buy them that way."

His answer to me at that time was, "Dave, I want to tell you as a friend, don't rock the boat. We have objections here from our customer about giving you private label and if you persist on asking this it's only going to cause you trouble."

MR. TUROFF: Objection. I move to strike.

THE COURT: Denied.

Q Is there anything else you can recall about that conversation?

A No, sir. There was nothing more on that one. I did talk with Mr. Payne again.

Q About when did that happen with respect to the previous conversation?

A Well, when he came with Mr. Steeb to New Orleans in May of 1969, as evidenced by that trip report, I seized upon that opportunity to --

Q Mr. Oreck, permit me to show you the date on Plaintiff's Exhibit 78, the trip report, which is the one I think you referred to.

A Yes, that's the one.

Just a moment. Yes, sorry, I got my date wrong there.

Q Plaintiff's Exhibit 78 you want to change your date on?

A Yes, the date was 1970 -- May of 1970 instead of '69, when he and Mr. Steeb came. I am sorry.

When I had the meeting -- may I continue?

Q Please.

A When I had the meeting in New Orleans with Mr. Steeb, who was Mr. Payne's boss, I seized upon that opportunity to ask once again if they would make us a product without a name on it because Airway had asked us for a quotation on 5000 and on 10,000 units, and, in fact, Mr. Payne sent to Airway at our suggestion, at our request, color chips, because they wanted the unit made in green instead of whatever color we had -- black, I guess -- and so I asked again at that meeting of Mr. Steeb for approval for us to get into the private label business. I told him there that it appeared to have from what Rexair had told me and Airway had told me that there could be 100,000 units sold a year

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of C.A.P. alone.

MR. TUROFF: I object and move to strike. They are simply trying to get in what your Honor --

THE COURT: That is what he said to Mr. Steeb; is that right?

THE WITNESS: Yes, sir, that is right.

THE COURT: Overruled.

THE WITNESS: That's what was said.

BY MR. HOFFMAN:

Q Mr. Oreck, will you proceed with your statement?

A That's it.

Q Were there any further conversations concerning this matter that you can remember?

A There was something that followed shortly thereafter either by letter or by telephone denying my request which came from, if my memory serves me, Mr. Steeb. After that I don't recall any more discussions. I kind of got discouraged about it.

* * *

* * *

(Plaintiff's Exhibit 81 marked for identification.)

BY MR. HOFFMAN:

Q I show you 81 for identification, Mr. Oreck. Can you tell us what it is?

A This is a memorandum, a Steeb letter to me, from my salesman, Mr. Murray Fink.

Q Who is Mr. Fink, would you say?

A He is a salesman that worked for me.

Q What were his responsibilities?

A At this time his responsibilities, among other things, was to solicit business wherever we could get it from, I guess. He was a salesman.

MR. HOFFMAN: Your Honor, I offer 81 into evidence.

* * *

* * *

xx (Plaintiff's Exhibit 81 received in evidence.)

MR. HOFFMAN: Your Honor, in this case may I ask the witness to read it rather than myself, since he is familiar with the handwriting?

THE WITNESS: You want me to read this?

BY MR. HOFFMAN:

Q Can you read this?

A Yes. It is addressed to David Oreck and it is dated 7/29/68.

It reads as follows:

"Quote as follows to Airway sanitizer power upright only, no hose. Paint nozzle casting aqua.

"Hood port No. 721418, white.

"Quantities: 3000, 5000, 10,000, 15,000."

Q Then there is a space. The simple M is used and the quantities. I take it M is thousands?

A M means thousands. Then there is a paragraph and it says, "Quote as follows for Rexair.

"Power upright only (no hose).

"Paint: Unpainted.

"1000, 5000, 10,000."

And there is a paragraph, and it reads:

"David" --

And he underscores -- "if we can't give quotations as the customers request, we are going to drop the ball on this business also. We can't wait six weeks to come up with a quotation. What were you telling me about developing a sense of urgency?"

Signed "Murray."

* * *

Q Did Whirlpool ever give you a price on private label vacuum cleaners?

A No, sir.

* * *

Q Mr. Oreck, after termination of your franchise, did you make any efforts to buy inventory from the Whirlpool Corporation, inventory vacuum cleaners which they had at

that time?

A Yes.

* * *

MR. HOFFMANN: Your Honor, if I may be permitted to shift around a bit, I think sequentially I would rather ask this question and go at it a bit later on. I am going to come back to period just prior to termination.

(Plaintiff's Exhibit 94 was marked for identification.)

xx Q I show you 94 for identification and ask can you tell us what it is?

A This is a letter that I wrote to Elisha Gray, II on May 12, 1971 at Whirlpool. He was then the chairman of the board.

Q What was the occasion for sending this letter?

A I was advised by telephone by John Steeb that Whirlpool was going to cut off my vacuum cleaner business as of the end of the year and I was writing an appeal to Mr. Elisha Gray, who was responsible to my getting it to begin with.

Q How were you advised of the termination that

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was in prospect?

A I was advised first by telephone.

Q From whom?

A From Mr. Steeb, John Steeb.

Q Tell us, please, as best you can recall what took place in that telephone conversation?

A Mr. Steeb called me early May of 1971, and in that telephone conversation he said that Whirlpool was going to terminate my franchise as of the end of the year. I asked him why they would do such a thing when business had never been better, our sales were just fine, we had complied in every respect to everything they would have us do as far as I knew, and I asked him why they would do this.

He said, "I am not permitted to discuss the matter with you; I am not permitted to give you any reasons why we are doing this, but that is the way it is."

I asked him at that time was there no appeal, was there nothing that I could do, was there anything that I had done wrong that I could correct?

He said, "No, there is no sense in discussing it. I have been giving very strict instructions not to give any reasons whatsoever."

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I then asked him, "Well, can I, at least, get a hearing with Mr. Gray or Mr. Platt or Mr. Sparks?"

He said he would let me know about that, and that was about that conversation.

MR. TUROFF: Your Honor, I am going to move to strike all of this. It is completely irrelevant. The contract which you have before you, which is 44 in evidence, has the expiration date of December 31, 1971, right on its face.

THE COURT: Motion denied.

Q Is there anything further that you can recall about that conversation with Mr. Steeb?

A Not in this particular conversation.

Q Were there any other conversations prior to this letter to Mr. Gray of May 12, 1971?

A Yes, sir. I had written to Mr. Gray, I would say, some time in April of 1971, and given him a comprehensive report of the eight years of work and what had happened here. I sent that letter to Mr. Gray.

MR. HOFFMANN: Before offering the Gray letter which has been marked, I would like to offer Plaintiff's Exhibit 95, which is an internal memorandum of the Whirlpool Corporation describing the telephone conversation.

THE COURT: 95 is being offered.

xx

* * *

(Plaintiff's Exhibit 95 was received in evidence.)

xx Q Now, sir, this memorandum, 95 in evidence, is addressed to the file and it has the initials of JGS. Do you know anyone who has such initials, JGS, at Whirlpool?

A That would be John Steeb.

(Mr. Hoffmann read from Government's Exhibit 95 in evidence to the jury.)

Q Mr. Oreck, did that meeting referred to in the last sentence take place?

A Yes, it did.

MR. HOFFMANN: Your Honor, I would like now to introduce into evidence the letter from David Oreck to Elisha Gray, which has been previously marked as 94. It seems to me it has been corroborated by the memorandum from Whirlpool's own file.

MR. TUROFF: We object. It is a blatant self-serving document, full of conclusions, full of his own feelings of what he had done, et cetera.

THE COURT: Yes, I agree. I am going to exclude that.

* * *

ms

AFTERNOON SESSION

(2.00 p.m.)

Oreck - Direct

* * *

Q I show you Government's Exhibit 96 for identification and ask you if that is a letter you received on or about the date indicated, May 14, 1971?

A Yes, it is.

MR. HOFFMANN: Your Honor, I offer it in evidence as Plaintiff's Exhibit 96.

* * *

(Plaintiff's Exhibit 96 was received in evidence.)

Q Mr. Oreck, in your testimony prior to the luncheon recess you discussed a telephone conversation that you had with Mr. John G. Steeb at or about this time. Noting the reference in the first line of this:

"This is to confirm our telephone conversation of May 10."

Is that the conversation to which you were refer-

ring in your testimony just prior to the noon recess?

A Yes.

Q After May 14, 1971, the date of this letter, did you have any further conversations with Whirlpool officials concerning the possibility of getting the decision to terminated you reversed?

A Yes, I did.

Q Tell us when the first conversation after that date took place?

A Mr. Steeb and Mr. Sparks came to visit me in New Orleans the latter part of May, the 25th, I believe.

Q May 25?

A I believe that was the date.

Q Did a conversation ensue in New Orleans?

A Yes.

Q Was that at your place of business there?

A Yes.

Q Was anyone else present besides Mr. Steeb and Mr. Sparks and yourself?

A No, there was no one else besides the three of us.

Q How long did the conversation last?

A I would guess that it lasted two hours.

Q Tell us as best you can what took place during

that conversation?

A Mr. Sparks opened the meeting and he told me at the beginning, he said, "I am here to listen; I am not going to talk. I think I ought to tell you at the outset that there is nothing that you can say that will have any meaning, but I am going to extend you the courtesy of listening to you."

And with that, I picked up my end of the conversation, I started all the way back at the beginning with him again --

* * *

* * *

Q Mr. Oreck, in the course of this conversation in New Orleans, did you make an appeal to the Whirlpool representatives to reinstate or to continue your distributorship?

A Yes, I made a lengthy appeal to them; I gave all of the reasons why I felt that they should consider this or reconsider this, and the meeting lasted about two hours and they said nothing. And when I was done talking they said they could not answer or give any reasons why they would not change their mind, and the meeting was over with.

(Plaintiff's Exhibit 97 was marked for identification.)

xx Q Mr. Oreck, 97 for identification is a copy of a letter Mr. Sparks to you under date of June 2, 1971.

Can you say whether or not this is the letter received by you at or about that time?

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A Yes, this is the letter.

* * *

(Plaintiff's Exhibit 97 was received in evidence.)

xx (Mr. Hoffmann read from Plaintiff's Exhibit 97 in evidence to the jury.

(Continued on next page.)

T2 xx (Plaintiff's Exhibit 98 marked for identification.)

BY MR. HOFFMAN:

Q Mr. Oreck, you have in your hand Plaintiff's Exhibit 98 for identification entitled "Whirlpool Corporation, Contract Sales Division, Trip Report," signed by John D. Payne.

Sir, did you have a meeting with Whirlpool officials in which there was any report made to you of the considerations within the Whirlpool organization as to the termination of the Oreck franchise? Did you have a meeting with Whirlpool representatives in which those considerations were revealed to you?

A No, I can't say that I recall a meeting of that sort other than those I described.

* * *

xx (Plaintiff's Exhibit 98 received in evidence.)

MR. HOFFMAN: Here we have Exhibit 98, which

describes a trip report.

(Mr. Hoffman read from Plaintiff's Exhibit 98 in evidence.)

MR. HOFFMAN: I should mention John D. Payne, Contract Product Manager, Contract Sales Division, is the person writing this memorandum.

(Mr. Hoffman continued reading from Plaintiff's Exhibit 98 in evidence.)

MR. HOFFMAN: Now, with your Honor's leave, I would like to read Paragraph 14 of the franchise agreement:

"14. Any change in our relations with the distributor involves a major consideration of policy. It is as vital and important to Whirlpool as it is to the distributor. You may therefore be assured that when any of the circumstances referred to in Subparagraphs (a) and (b) of Paragraph 13 above arise they will not only be reviewed carefully with you, but will receive the most judicious consideration by not less than three officers of Whirlpool before your distributor is terminated."

The reference is to the circumstances referred to in Subparagraphs (a) and (b) of Paragraph 13, which is immediately above in the agreement, and is as follows:

"Your distributor may be terminated by Whirlpool prior to the expiration of its term in any of the following events in Paragraph (a) a deterioration in or the inadequacy of your financial resources to fulfill your obligations hereunder.

"(b) Your disregard of or unwillingness to adhere to the provisions of this franchise and other merchandising or business policies of Whirlpool."

BY MR. HOFFMAN:

Q Mr. Oreck, at any time prior to your receiving notice of termination in 1971 was a statement made by a Whirlpool official to you indicating that in the Whirlpool view there had been a deterioration in or inadequacy of your financial resources to fulfill your obligations?

A No, sir.

MR. TUROFF: Just a minute. I object. We are not talking here, your Honor, about termination of an agreement prior to its term. The evidence that they have introduced here shows that they simply said, "We are going to let the agreement expire at the end of its term."

Paragraph 13 on its face has no application.

THE COURT: Objection sustained.

(Plaintiff's Exhibit 99 marked for identification.)

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MR. HOFFMAN: Your Honor, without ado I will offer 99 in evidence.

* * *

xx (Plaintiff's Exhibit 99 received in evidence.)

MR. HOFFMAN: 99 is a communication from John D. Payne of Whirlpool to Marshall Oreck of the Oreck Corporation and it refers to certain numbers.

(Mr. Hoffman read from Plaintiff's Exhibit 99 in evidence.)

BY MR. HOFFMAN:

Q Do you know what that reference is, Mr. Oreck?

A I think it means order to manufacture and it's Whirlpool designation number for purchase order.

Q Would the same be true for the next two references OTM-71271-2 for 10,000 CAP-33 and OTM-71271-3 for 3000 CPR 3000?

A Yes, that would be the same.

(Mr. Hoffman continued reading from Plaintiff's Exhibit 99 in evidence.)

MR. TUROFF: Are we going to get the rest of it read?

MR. HOFFMAN: Not at the moment.

THE COURT: Do you wish to read that part of it?

MR. TUROFF: I think he ought to read the whole paragraph. There are three other paragraphs.

THE COURT: Is it incomplete without reading thos other paragraphs?

MR. TUROFF: Yes, your Honor.

THE COURT: Then you may read those paragraphs.

(Mr. Turoff read the last three paragraphs of Plaintiff's Exhibit 99 in evidence.)

* * *

* * *

Q Mr. Oreck, are you familiar with Oreck Corporation having placed the orders described on the top of this exhibit, that is to say, those reference numbers which you read, 1 for 25,000 CVR, 2 for 10,000 CAP and 3 for 3000 CVR 3000?

A Yes, sir, I remember that.

Q Do you remember the circumstances under which the orders were placed?

A Yes, I remember this.

MR. TUROFF: I object.

THE COURT: Overruled.

A We ordered the merchandise in the normal way and in the normal course of events the way we always ordered.

Q When you say the normal way in the normal course

of events, what do you mean by that?

A We issued a purchase order to manufacture them, we wanted them, and we would give them releases as we normally would do on all orders. After they were manufactured they would be released to us and in an orderly fashion and that's the way we ordered them.

Q Mr. Oreck, can you state whether you bought vacuum cleaners from Whirlpool in anticipation that you could resell them?

A Indeed. I wouldn't buy them if I couldn't.

(Plaintiff's Exhibit 100 marked for identification.)

Q Mr. Oreck, would you examine this exhibit for identification, please, and tell us, if you can, what it is? What does it consist of?

A This consists of a memorandum to John Payne, an Oreck Corporation speed letter, I guess, signed by Marshall Oreck.

The second is a letter to John Payne dated July 29, 1971, John Payne at Whirlpool Corporation at St. Paul, Minnesota, signed by me with a copy to Jack Sparks.

The third is an invoice from Whirlpool Corporation to us for some vacuum cleaners.

The next is another invoice from Whirlpool to

Oreck Corporation.

The next is an order from Oreck Corporation to Whirlpool to ship directly to one of our customers RCA Family Stores in Bloomington, Indiana, to dropship an order to them.

And the last page is a shipping document from Whirlpool Corporation showing that they had shipped the vacuum cleaners we ordered to RCA Family Stores in Bloomington, Indiana, a bill of lading.

MR. HOFFMAN: Your Honor, I offer these in related documents all together as a single exhibit, Plaintiff's Exhibit 100.

* * *

x x x

MR. HOFFMAN: Your Honor, without pressing the exhibit then, may I withdraw it and simply offer the letter of David Oreck to John Payne under date of July 29, 1971, as Exhibit 100.

MR. TUROFF: I object to it as irrelevant.

THE COURT: Overruled.

xx (Plaintiff's Exhibit 100 received in evidence.)

THE COURT: You are marking just the letter as Exhibit 100.

MR. HOFFMAN: Just the letter, and I am asking the other be withdrawn.

Plaintiff's Exhibit 100 in evidence is a letter from David Oreck to John Payne under date July 29, 1971.

(Mr. Hoffman read from Plaintiff's Exhibit 100 in evidence.)

BY MR. HOFFMAN:

Q Mr. Oreck, did you receive, if you can recall, any response to your letter of July 29, 1971?

A I do not recall any response to that letter

to me. That may have come through Marshall Oreck.

xx (Plaintiff's Exhibit 101 marked for identification.)

BY MR. HOFFMAN:

Q Mr. Oreck, you have in your hand 101 for identification. Can you tell us what it is?

A This is a letter on Whirlpool stationery dated August 4, 1971, addressed to me in New Orleans and signed by John G. Steeb, General Manager of Contract Sales, with a copy to Jack Sparks.

* * *

xx (Plaintiff's Exhibit 101 received in evidence.)

(Plaintiff's Exhibit 102 marked for

xx identification.)

Q Mr. Oreck, you are looking at 102 for identification. Can you tell us what it is, please?

A This is a letter on Whirlpool stationery addressed to me in New Orleans and dated November 24, 1971, signed by John G. Steeb, General Manager of Contract Sales, with a copy to J.D. Sparks.

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MR. HOFFMAN: I offer 102 in evidence, your Honor.

MR. TUROFF: I have no objection.

(Plaintiff's Exhibit 102 received in evidence.)

MR. HOFFMAN: Plaintiff's Exhibit 101, which is a letter to Oreck from Steeb, dated August 4, 1971, reads as follows:

(Mr.Hoffman read from Plaintiff's Exhibit 111 in evidence.)

Q Mr. Oreck, did you concur in this?

A I do not recall that I did.

Q Do you recall any meetings taking place with Mr. Steeb or some other Whirlpool representatives between August 4, 1971, and November 24, 1971. concerning the matter of Whirlpool's acceptance of purchase orders from Oreck Corporation?

A I did have a meeting with Mr. Sparks concerning --

Q I am sorry. When did that take place?

A It was on -- it was in the same period of time, on or about the time of this letter. I am sure it wasn't the exact day, but it was in this period, and in the meeting with Mr. Sparks I did discuss subsequent orders.

Q Can you tell us what passed between you at that

meeting?

A I met with Mr. Sparks at my suggestion at the O'Hare Airport in Chicago. He got a meeting room there so that we could meet at that meeting.

I asked him about deliveries after the 1st of the year. I told him I wanted to buy merchandise after the 1st of the year, I would buy it without a Whirlpool name.

I asked him about warranty. I pointed out that we had -- would have by the end of the year probably 200,000 or more vacuum cleaners, Whirlpool vacuum cleaners out; that the customers held us responsible for supplying parts and warranty replacement parts and service and the like. I wanted to know what our situation would be in view of the previous meetings that we had.

I asked him at this same meeting would he provide me with all of the necessary information whereby I might have this product, if they would not sell it to me, manufactured by someone else for me. I requested the UL information, the testing information, the component suppliers and about half a dozen other things that were important for manufacturing because I explained to him that I had hoped to interest someone in making this for me and I had one interested party provided they could get

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everything necessary to make it.

I put that question to him at that time as well.

* * *

A (Continuing) I asked him about delivery of any merchandise that might not have been delivered to me before the end of the year to be delivered shortly after the 1st of the year. And he said that he doubted very much if they would sell that to me.

And I said, "Well, Jack, what are you going to do with it?"

And he said, "Well, I'll tell you," he said, "We lost" --

MR. TUROFF: Your Honor, excuse me. Where are we going? This witness is making a speech. We are talking about in the future. He is now talking about a term after the franchise or contract as everyone called

it expires. It has got a date of December 31, 1971, on it and I don't know how to characterize this.

(At the side bar.)

MR. HOFFMAN: Your Honor, we are saving a great deal of time in this matter covering ground which otherwise I would be asking questions about.

THE COURT: No. As I understand it from your opening statement you are getting into what is arguing evidence to the jury from the Sears Roebuck intervention in this case to cut this man off and I gather that this conversation, from what you suggested in your opening, is going to cover the fact that they were not going to sell any of this merchandise even if they took a loss on it.

MR. HOFFMAN: Yes, precisely.

THE COURT: Mr. Turoff, if that is the proof and if that is the evidence it certainly is admissible on the question the jury is to consider.

MR. TUROFF: I have to respectfully disagree.

THE COURT: Don't you acknowledge that the jury could conclude that there was some strange motive for Whirlpool saying, "We won't sell it to you even if we have to take a loss on it"?

MR. TUROFF: Your Honor --

THE COURT: It seems to me this is certainly

MR. TUROFF: I respectfully disagree and the record shows my disagreement.

THE COURT: Go ahead.

MR. HOFFMAN: Your Honor, I want to ask this much: when Mr. Turoff interrupts the witness in his statement, would you be good enough to ask the reporter to read back a sentence or two before the interruption?

THE COURT: It depends. If he needs it, I will be glad to do it.

MR. HOFFMAN: All right, thank you.

(In open court.)

THE COURT: Would you read the last portion of the answer?

(Read.)

THE COURT: You may continue.

A He said, "We lost millions of dollars when we junked the gas refrigeration business and got out of it."

And he said it won't hurt us if we junk or scrap these. And that was the end of that meeting.

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MR. HOFFMANN: I would like to read, your Honor, 102, which is in evidence.

(Mr. Hoffmann read from Plaintiff's Exhibit 102 in evidence to the jury.)

Q Now, sir, the telephone conversation which Mr. Steeb confirms in 102, do you have a recollection of that conversation?

A Not specifically.

Q Is your recollection such recollection as you have confined to what is reported here on Exhibit 102?

A Yes, I do recall that in a general way.

Q I show you again Plaintiff's Exhibit 99.

Do you have that on the table?

A I don't know which one it is.

Q Notice, if you will, that 99 is dated July 26, 1971? Is that correct?

A Yes, sir.

Q Had Oreck Corporation reached any agreement with Whirlpool as of that time, as of July 26, 1971 for, to quote Mr. Steeb, an orderly phase out of the business by the end of the year?

A We had not reached any agreement as to an orderly phase out.

Q Was any effort made to reestablish this order

for 25,000 CVR-2000, 10,000 CAP-33 and 3000 CVR-3000, which is the subject of Plaintiff's Exhibit 99? Did you make any effort to get Whirlpool to fill that order after it was rejected?

A Well, yes, that was contained in the letter of July 29 to John Payne by me some three days later, when I returned all the orders immediately and said, "This is what we want."

* * *

* * *

Q Just before we closed yesterday, Mr. Oreck, Plaintiff's Exhibits 1 and 2 were introduced in evidence.

The last sentence of this exhibit reads:

"All inventory of Whirlpool vacuum cleaners which is in Whirlpool Corporation's possession as of December 31st, 1971 will not be shipped and will remain Whirlpool Corporation's property to do with and dispose of as it in its sole discretion deems appropriate."

Do you know whether or not Whirlpool had an inventory of vaccum cleaners as of the end of the year 1971?

* * *

A Yes, sir, they had 30,000 units in stock, assorted.

Q How do you know this?

A They published an inventory report dated 12/30/71 that was sent to us.

Q Did Oreck Corporation offer to buy this inventory?

A Yes, sir, it did.

MR. TUROFF: I object, your Honor, as irrelevant.

THE COURT: Overruled.

You may answer.

A Yes, we wanted to buy them.

Q Did it offer to pay cash for the inventory?

A Yes, we were prepared to pay cash for them.

Q And did Oreck have the cash to be able to do so?

MR. TUROFF: I object. That is not the question. The question was did you offer to pay cash and the witness said, "Yes, we were prepared," which is quite different.

THE COURT: I suppose technically you are right. Strike the answer out.

MR. HOFFMANN: May I have the question repeated?

THE COURT: Did you offer to pay cash?

A Yes, we did.

Q And the next question was, did you have the cash available to make good on that offer?

A Yes, sir.

* * *

(Plaintiff's Exhibit 103 was marked for identification.)

xx MR. HOFFMANN: Plaintiff's Exhibit 103 for identification is a communication from A. S. Clark to

jws Oreck - direct 330

John Steeb, General Manager, Contract Sales, Administrative Center under date of June 7, 1972.

It comes from Whirlpool and I offer it in evidence.

* * *

(Plaintiff's Exhibit 103 was received in evidence.)

2 MR. HOFFMANN: Plaintiff's Exhibit 103 in evidence is a communication --

Q By the way, Mr. Oreck, do you know who A.S. Clark is?

A He is a Whirlpool employee.

(Mr. Hoffmann read from Plaintiff's Exhibit 103 in evidence.)

(Plaintiff's Exhibit 104 was marked for identification.)

xx

jws Oreck - direct 331

MR. HOFFMANN: Once again, your Honor, this document comes from the files of Whirlpool and was presented to us pursuant to notice and I offer it in evidence.

* * *

(Plaintiff's Exhibit 104 was received in evidence.)

xx Q Who is Vern G. Phillippi?

A He is a Whirlpool employee.

Q Who is John Payne?

A Manager of the contract division at St. Paul in 1971.

MR. HOFFMANN: This is under date of October 27, 1971.

(Mr. Hoffmann read from Plaintiff's Exhibit 104 in evidence.)

xx MR. HOFFMANN: And then the second sheet under the same date, October 27, 1971, are details about storage handling and cartage in which the grand total is the sum of $15,516.44.

Q Now, Mr. Oreck, these vacuum cleaners are

referred to as Oreck Vacs. What do you understand the phrase Oreck Vacs to mean?

* * *

A The Oreck vacuum cleaners were Whirlpool Models CVR-2000, CVR-3000 and CAP-33 which were the three models that were in stock at the time, and these Oreck vacuum cleaners were identified not only by the model numbers which I have given, but they were further identified by a sticker on the unit that said, "Oreck Corporation."

The dust bags that were packed within the cleaner were marked "Oreck Corporation."

The service manual and the customer's instruction manual were all marked "Oreck Corporation" and contained our address so that the customer could write to us fro parts for service or for replacement dust bags. And all of those things constituted the Oreck vacuum cleaner.

* * *

* * *

Q Come the years 1967 and 1968 did you change your distribution methods?

* * *

* * *

A Yes, sir, we did change our distribution methods.

Q And what new method did you institute?

A We redirected our efforts away from the department store dealer approach more to the mail order sales route.

* * *

Q Sir, did your volume of sales increase after you changed your distribution methods in 1967 and '68?

A Yes, they did.

Q To what do you attribute that increase?

* * *

A Our success --

THE COURT: No, no.

Mr. Oreck, the question is to what do you attribute the increase in sales. Just answer that question.

A The increase in sales was because of the new approach through the mail.

* * *

T2

* * *

Q This new approach, the direct mailing, is that what you testified to before?

A Yes, sir, this new approach is direct mailing.

Q Was direct mailing the only distributor technique which you used fom 1967 and 1968 on?

A It was the principal technique that we used.

* * *

Q What other techniques?

A The other technique was sales through the institutional supply jobber.

Q Did you do anything to reinforce the direct mailing technique by way of advertising?

A Yes, sir, we did.

Q Sir, you noticed an increase after you instituted direct mailing in your sales? Is that what your testimony

mp2 Oreck-direct

was? Were you able to pinpoint the reasons for the increase in terms of your new distribution methods?

* * *

Q Mr. Oreck, were you able to pinpoint that?

A Yes, in the direct mail business you can pinpoint your results very well.

Q Howwas that accomplished?

A In the direct mail business you make a mailing to a prospective customer and end user and you can get or you cannot get an immediate response, but you know whether or not you receive that response, whereas in selling to retailers you don't know whether or not he sold it right away, even if you manage to sell it to him, he may keep it in stock.

Q Your answer was general as to direct mailing. I ask you as to your distribution of the Whirlpool vacuum cleaner, were you able to determine the results that you have just described in a general way?

A Yes, sir, we were able to determine the results in that period.

Q What was done in making selections for recipients on direct mailing? Was there anything in particular done?

mp3 Oreck-direct

A Yes, we chose very carefully the people whom we would mail to. We could not afford to scatter our shots. We had to be specific. So we chose particular groups that we felt would be receptive and would give us the best return for the advertisements that we mailed out.

Q Please continue.

A These included professional people, doctors, lawyers, engineers and so on. We wrote our literature to appeal to them in great detail and we could mail and rifle shoot, you might say, directly to specific groups.

Q How did you obtain the names of people in these groups?

A These names are available of people who were in the field of selling names of physicians and what not.

Q Is that the way Oreck did it?

A Yes, sir, that is the way we did it.

Q Well, sir, when you engaged in this direct mail advertising to a selected group, did you just send out one flyer or one advertisement to them?

A No, sir, we would send out several. People respond very frequently to the second or third time that they receive a message, and so we would get a group and we would test out in a small number to see the response, and then we would repeat it and repeat it, because in the

advertising field repetition is very important and very effective, frequently.

Q Mailing to these selected lists, did that give you any merchandising advantages over those that you just described?

MR. TUROFF: I object to the question as calling for a conclusion, merchandising advantage.

THE COURT: What do you mean merchandising advantage?

Do you understand what is meant by that?

THE WITNESS: Yes.

THE COURT: What do you understand is meant by that term, so the answer will mean something to the jury and to me.

THE WITNESS: You are asking me?

THE COURT: I am asking you.

THE WITNESS: Yes. There were economies, substantial economies doing this as against through the traditional retail stores and so on.

Q Will you tell us what they were?

A Yes, sir. By going through and selling directly to the consumer, to the end user, we did not have to provide a mark-up, a profit for a retail store, we did not have to pay for any salesmen, we did not have to set up any reserves

for pilferage, and all the other costs that bring the cost of a product up quite substantially, and we could, instead, use a portion of this money in our advertising to the end user, and so we took what normally would have been the profits and what not to the retail store, and, instead, we offered the product at lower prices than we would have had to, and we could pay for our advertising with what normally would have gone to pay some salesman, so we could reach more people and we could reach them effectively with great literature that told in great detail what it was exactly that we would sell, and selling is the very key to success in the vacuum cleaner business.

MR. TUROFF: Objection.

THE COURT: No, I will let that stand as a statement or opinion of the witness.

BY MR. HOFFMAN:

Q Now, Mr. Oreck, you mailed and remailed to selective groups, did this serve in any way to give you a control over inventory?

A Yes, because in the direct mail business you do get a direct response, you can tell and project with great accuracy what your sales are likely to be. Once you have run your tests, you can then project it forward to bigger numbers.

Q How was that accomplished?

A We measure the number of responses based -- I should say not responses, we measure the number of sales that we get on the number of letters that we send out, and the letter and the return card has a number on it, and that number when the recipient returns it, we can compare that to the group that we had mailed to. We just didn't mail this to whom it may concern; we mailed it to a specific group and we identified the group by number, and when the response came, we could compare how many people purchased out of the group that we mailed to. So we called that the conversion rate, sales rate against the number of mailings, and once you had that number, a certain number of sales per thousand, you can usually project that to that same group if you mail to them again, that it is likely to get a similar response. So it is quite effective in projecting sales, and, of course, in purchases and the like.

Q Well, sir, did you keep a record which enabled you to calculate what you call the conversion rate?

A Yes, we did.

Q Can you tell us from the stand what that rate was?

A Yes.

MR. TUROFF: At what time, your Honor?

THE COURT: Yes.

MR. HOFFMAN: From the beginning.

A In 1967, when we first began this new approach, we were getting at that time 15/100ths of 1 per cent of the total vacuum cleaner market, what the industry was selling over-all, our share was only 15/100ths of 1 per cent, and at that time --

MR. TUROFF: This is not testimony as to the conversion rate. If he is now testifying as to industry figures, that is something else entirely. I am going to move to strike.

MR. HOFFMAN: Your Honor, perhaps it is premature in answering my question. I shall certainly be asking the question to which that is the answer.

THE COURT: Let us go to what you want. We will come to it later.

THE WITNESS: Very well. In 1967 in our initial mailings we received two sales per one thousand letters.

Q Is that what you call the conversion rate?

A Yes, sir, that would be 2/10ths of 1 per cent. So in 1967 we did get two sales per thousand mailings, and by 1971 doing the same type of mailings and so on,

nothing changed, really, it had built up to almost seven sales per thousand mailings, an increase, very substantial increase.

Q Sir, before you gave us the conversion rate you correlated your sales to larger universe which was all vacuum cleaners?

A Yes, sir.

MR. HOFFMAN: Before we go along that line -- I will refer to it later on -- I would like to go to some other line of testimony.

Would you be good enough to bring that box forward?

With your Honor's consent, I would like to be examined by the witness.

Will you mark this 105.

xx (Plaintiff's Exhibit 105 marked for identification.)

Q This box that has been marked 105 for identification, do you know what that is?

A Yes, sir, that is a Whirlpool CVR-2000 vacuum cleaner.

Q Where did you get this?

A We purchased this vacuum from Western Auto.

Q When did you purchase it?

A We purchased this some time after our contract, I would say about two years ago.

Q What is printed on the outside of the box?

A It says Whirlpool upright vacuum cleaner brushes and vacuums carpets and bare floor.

Q The model number appears there?

A Yes, sir, CVR-2000.

Q I notice a piece of tape on the box. Would you remove that?

I wonder if you could hold that so that the Court and jury may see it.

(Witness removes tape.)

A Underneath there it says National Distributor Oreck Corporation, 18 Elmcroft Road, Stamford, Connecticut, 06902.

Q Did you apply this tape, sir?

A No, sir.

Q Is that the way it came when you purchased it from Western Auto?

A Yes.

Q Have you purchased any other CVR-2000 from Western Auto?

A Yes, sir, we purchased over 400 of them.

* * *

* * *

Q As to the others which you purchased, were they packaged in the same way?

A Yes, they were all packaged exactly like this.

Q Do you know who put the tape on the boxes?

A Yes, sir, I do.

Q How do you know it?

A I received a work order of Whirlpool's instructing the plant to put the tape on the box and to make some 12 other changes to this unit.

Q Can we have it open to see what is really inside?

A Yes. Here are the other changes you talk about. The dust bags have Oreck Corporation crossed out and Whirlpool Corporation stamped in. The vacuum cleaner which had on the bag of it Oreck Corporation here, as does that one, that sticker had been removed, as well as the identification on the bottom of the unit. Every machine was packed with a dust bag in place inside the unit, and this was taken apart and was closed off. This was the way the customers could reorder the dust bags from us, and if

we took that dust bag out of there, it would say Oreck Corporation, with our address, so the customer would know where to send for parts and order his dust bags. The reorder envelope for the dust bags is exactly like the other one that we have in that unit and has been changed to Whirlpool Corporation, instead of Oreck Corporation. The customer's instruction sheets have been changed so every instruction sheet which looks like that had a label pasted over it, and it said for repair service or replacement of any warranty, refer to your warranty letter. If this was to be removed, in here it talks about replacement of warranty parts, but Oreck would be referred to under there.

MR. HOFFMAN: Has the reporter noted the fact that thatpiece of sticker paper was from the bag?

THE WITNESS: It was removed from the order instruction sheet. This says on here, "The components of the Whirlpool upright vacuum cleaner are guaranteed for 90 days by Oreck Corporation," and it goes on to give the warranty. This tape that was pasted over it says, "For repair service or replacement of warranty parts refer to your warranty letter." So that every reference within the booklet that had Oreck's name on it has been removed or pasted over or crossed out, as is seen here.

MR. HOFFMAN: Your Honor, may I pass this around to the jury?

THE COURT: I think it is evident to them.

MR. HOFFMAN: As a matter of mechanics, I propose to stuff these back in the bag of the machine.

THE COURT: I was going to suggest that all that go back into the box and remain as one unit.

BY MR. HOFFMAN:

Q What did you pay Western Auto for this vacuum cleaner that is in the box marked 105?

* * *

A We paid Western Auto $20.

Q What did you pay Whirlpool for the CVR-2000?

A We paid Whirlpool $29.

Q Do you have any knowledge of what Whirlpool charged Western Auto for 105?

MR. TUROFF: I am going to object, your Honor. First, he has to establish how he has knowledge.

THE COURT: Yes.

Q Go ahead.

A We dealt with one official of Western Auto who sold us these cleaners and he told us he paid $14 --

MR. TUROFF: Objection.

THE COURT: Wasn't this developed in some other way during pretrial preparation?

MR. HOFFMAN: May we approach the bench?

(At the side bar.)

THE COURT: Is there any question what you charged?

MR. TUROFF: I am sure there is not. He is talking about 1974.

THE COURT: We are talking about what you charged for it.

MR. HOFFMAN: I don't know if you want this to be on the record, but I have not asked the witness whether he heard you make a statement about this during your opening. It seems to me I recall you did. Do you have a recollection of that?

MR. TUROFF: I don't recall that at all. The record will show.

THE COURT: In the interest of saving time, he is going to argue to the jury that instead of selling it to Oreck, you dumped it, sold it to someone else for under $20, and this was motivated by the conspiracy that you had with Sears Roebuck. That is his argument, and good, bad or indifferent, he is entitled to make it. Since he

can serve a subpoena on you and get the figure from you as to what you sold to Western Auto, why don't we just establish what that figure is at some point during the plaintiff's direct case and put it in?

MR. TUROFF: All right.

MR. HOFFMAN: Can I suggest it is $15.

* * *

MR. HOFFMAN: With your Honor's leave I would like my colleague, Mr. Agree, to read certain questions and answers which were promulgated in interrogatories to Sears Roebuck & Company.

THE COURT: Ladies and gentlemen, given the way matters are progressing here, I am going to permit the direct examination of Mr. Oreck to be suspended at this point while we go on to another matter. Certain answers to interrogatories will be read to you, the responses of Sears Roebuck and Whirlpool, certain questions put to them by the plaintiffs counsel, and by that I don't by any means indicate that Mr. Oreck is finished. Obviously, he has not been cross-examined. So you will treat it as if we were going to suspend his testimony at this point and go to some other matter.

MR. AGEE: Your Honor, it might be helpful if the Court explained somewhat in more detail to the jury just the nature and effect of interrogatories that are formally propounded and answered under oath.

THE COURT: Ladies and gentlemen, these are questions put by the attorneys for the plaintiff to the attorneys for the defendants to be answered by some,

I assume, corporate officer in each case, and those answers are in writing, as are the questions, and they are sworn to. You are to treat them just as if a person had come into this room and made those statements before you. They are to be treated as evidence for you to consider.

MR. HOFFMAN: It might be a little less fatiguing if one of my colleagues read the questions and the other read the answers. This is Mr. Agree and this is Mr. Singer.

THE COURT: Yes.

MR. AGREE: Your Honor, ladies and gentlemen, I begin with the supplemental answers of Sears Roebuck & Company to plaintiff's interrogatories. These supplemental answers were given by Sears under oath on March 7, 1975, and they were certified by Mr. Tauche, the attorney for Sears Roebuck, who is present here in the courtroom. The actual answers were given under oath by one, A.F. Shea, an assistant buyer of vacuum cleaners for Sears Roebuck & Company, one of the defendants herein.

Interrogatory 8: "Has any officer or director of Sears had any equity, debt or other interest in Whirlpool? If so, state the identity of such person and the period, amount and nature of such interest.

"ANSWER: Yes. Holdings of record by Sears inside directors or officers is as follows:

"Robert H. Anderson - 50 shares - acq. 9/18/74

"Thomas F. Fillene, Jr. - 300 shares - 1959

"Stock split - 300 shares.

"Stock sold or transferred in 1966."

Interrogatory 10: "Has Sears had any equity, debt or other interest in Whirlpool? If so, state the period, amount and nature of such interest.

"ANSWER: Yes. As of January 1, 1963, Sears Roebuck and Co. owned 251,192 shares or 4.8% of the outstanding Whirlpool common stock and Sears Allstate Insurance Company, its subsidiary, owned 169,616 shares or 3.2% of the outstanding common stock. The number of shares held by Sears increased in 1965 and 1972 due to stock splits, and in 1969 when Sears acquired 21,886 additional Whirlpool common shares in payment for shares of the Heil-Quaker Corporation. After a 3 for 1 stock split, and a secondary offering in 1972 the figures are as follows:

"Sears 1,197,810 shares - 3.4%

"Allstate 299,698 shares - 0.8%

Interrogatory 12: "State each date during the period 1914 through the present on which Sears

acquired any shares of common stock of Whirlpool, the number of shares acquired on such date, and the number of shares which Whirlpool had outstanding on such date.

"ANSWER: The forerunner of Whirlpool Corporation, the Upton Machine Company, was formed about 1916, and in 1925 Sears acquired 750 shares of that corporation. A stock split in 1928 brought Sear holdings up to 17,500 shares. Subequent to 1928, the Upton Machine Company underwent major corporate changes,including merger with the Seeger Refrigerator Company, in 1955, and the Birtman Electric Company in 1957. The name of the resulting corporation was changed to the Whirlpool Corporation in 1957.

"As of January 26, 1956, Sears owned 134,443 shares of the outstanding Whirlpool stock. As of July 31, 1958, Sears owned 270,792 shares or 4.4% of the outstanding stock of Whirlpool. As of January 31, 1960, Sears owned 251,192 shares of Whirlpool or 4% of its outstanding stock, which percentage is reflected in Sears answer to Interrogatory No. 10. This figure has remained relatively constant since that time."

Answers to Interrogatories 377

Interrogatory 21: "Describe Sears' dealings with Whirlpool relating to Heil-Quaker Corp."

* * *

* * *

"ANSWER: Heil-Quaker Corporation manufactures central heating and electric air conditioning equipment which is sold to Sears and others. Whirlpool owns 80% of the common stock of Heil-Quaker Corporation and all of its preferred stock, and Sears own 20% of its common stock.

"22. Describe Sears' dealings with Whirlpool relating to Warwick Electronics, Inc.

"ANSWER: Warwick Electronics, Inc. is the supplier of television receivers, radio-phonograph combinations and home entertainment electronic products to Sears and others. Whirlpool owns 57% of Warwick common stock and Sears owns 25.5%. The remainder of the stock is publicly held."

MR. AGEE: Interrogatory 64:

"Did Sears ever request Whirlpool to take any steps to provide shipping cartons for vacuum cleaners, attachments, accessories or parts that were subject to the lowest possible postage rates or were otherwise the most economical? If so, identify each such communication and state the results thereof.

"Answer: Most Sears shipping is by freight, either truck or rail, and consequently its prime concern is to achieve a package for shipment by this means which minimizes the damage rate to the product, but which can be manufactured for a reasonable cost. Postal rates are not involved in this decision."

Interrogatory 65:

"Did Sears ever request Whirlpool, in substance or effect, to take any steps to supply Sears with the most up to date, modern or improved vacuum cleaners attachments or accessories available? If so, identify each such communication and state the results thereof.

"Answer: Sears reviews its product line on a weekly and monthly basis with a view to merchandising the most up to date and modern vacuum cleaners

available. It reviews sales efficiency and monthly sales rates of parts as well as the lastest consumer research. It also evaluates comment of home economists and compares the sale of items which have been successful with those which have not been as successful. On the basis of this review, Sears, from time to time, suggests to Whirlpool changes it believes might solve problems which have arisen in the product. More commonly, Sears presents problems it has uncovered to Whirlpool and requests that Whirlpool suggest changes which will eliminate these problems."

Interrogatory 67:

"State the full circumstances of each step in Sears' acquisition of any interest in Simpson-Sears, Ltd., including, without limitation, the date, nature and amount of each such acquisition of any interest and Sears' reasons therefor. Identify each individual who is or was an officer or director of Sears and of Simpson-Sears, Ltd. and state the time thereof.

"Answer: In 1952 Sears acquired 50 per cent of the outstanding common voting stock of Simpson-Sears, Ltd. As of this date Sears holds 49.9321

per cent of this stock."

MR. AGEE: May I beg your indulgence just one moment, your Honor.

(Pause.)

MR. AGEE: If I may just briefly read now from not the supplemental answers, but the original answer of Sears Roebuck & Co. to plaintiff's interrogatories which was subscribed and sworn to the 31st day of January, 1973 by Thomas L. Smith, buyer of vacuums for Sears Roebuck & Company."

Interrogatory 3:

"Identify the persons serving on your Board of Directors, the executive committee of the Board of Directors, and the persons serving as officers of

* * *

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FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

XXX

THE COURT: Mr. Turoff wants to know how many directors there are and I thought that was appropriate.

MR. TUROFF: Let the record show, your Honor, that 42 names are listed.

MR. AGEE: 42, your Honor.

This covers the time period from 1962 through 1973.

Back to the supplemental answers to interrogatories stated in March 1975.

Interrogatory 100:

"State separately whether anyone at Sears has ever had any communication with anyone at Whirlpool which related in any way to" --

and there follows a list of subjects indicated by Subparagraph a through bb.

The answer was:

"Sears had communications with Whirlpool concerning Subparagraphs f, m, and aa. Sears had no communications with Whirlpool concerning

the other paragraphs."

Subpararaph f was:

"Whirlpool's decision that Oreck's distributorship of vacuum cleaners and attachments would end on December 31, 1971."

MR. SINGER: The answer reads;

"With regard to Interrogatory 100-f:

"In 1969 Mr. Smith of Sears was asked whether he would object to use of certain of Sears tools to make vacuums to be sold by Whirlpool to Oreck, and he did object, pursuant to Sears usual policy. At the time he was unaware of the fact that his predecessor had approved the use of Sears tools for this purpose. Whirlpool continued to use such tools to make vacuums for Oreck.

"b. No such steps.

"c. No such steps indicated.

"In April 1971, Mr. Boyar sent a communication he had received from J. M. Barker, an Honorary Director of Sears, to Mr. Platts of Whirlpool, stating that Oreck's direct mail advertising would have an adverse effect on the reputation of Whirlpool. shortly thereafter Mr. Boyar received a letter from Mr. Willemin of Whirlpool which indicated a concern

about Oreck's misleading advertising.

"b. No such steps.

"c. No such steps indicated to Sears.

"In January or February 1972, Mr. Boyar in a note to Mr. Willemin expressed concern about the effect on Whirlpool of the use by Oreck of the Whirlpool logo.

"Mr. Smith of Sears was informed by Messrs. Wardeberg and Vandermyle of Whirlpool in mid-1971 that the sales agreement with Oreck would expire at the end of 1971."

MR. SINGER: Then we go --

MR. TAUCHE: Would you please read the b and c parts again?

MR. SINGER: It says:

"No such steps.

"No such steps indicated to Sears."

MR. AGREE: Interrogatory 100-m reads:

"State separately whether anyone at Sears has ever had any communication with anyone at Whirlpool which related in any way to m, Whirlpool's decision not to sell to Oreck tools or drawings or other technical information to enable Oreck to manufacture vacuum cleaners."

MR. SINGER: With regard to Interrogatory 100-m:

"About 1963, Mr. Danhauer of Sears was asked by Whirlpool whether Sears would permit the use by Whirlpool of its tools to produce Whirlpool vacuums for Oreck Corporation.

"Mr. Danhauer agreed, and a royalty letter arrangement was executed whereby Sears would receive a royalty on vacuums manufactured on its tools by Whirlpool for other Whirlpool customers.

"The tools were used to manufacture vacuums for other customers and Sears received royalty payments.

"Sears owned tools used by Whirlpool in the manufacture of vacuums for Sears, and Mr. Smith of Sears informed Mr. Wardeberg of Whirlpool in 1971 that Sears was not interested in selling these tools."

Then there are II-b and c:

"No such steps" and "No such steps indicated to Sears."

MR. AGEE: Interrogatory 100-aa -- again let me read the previous Interrogatory 100:

"State separately whether anyone at Sears has

ever had any communications with anyone at Whirlpool which related in any way to aa, mail order sales by Oreck."

MR. SINGER: "With regard to Interrogatory 100-aa, Mr. Smith at Sears sent to Mr. Wardeberg of Whirlpool in 1971 for its information copies of Oreck mail solicitations received by Sears."

b has: "No such steps. And then "No such steps indicated."

MR. AGEE: We do have a few more, your Honor.

Might we have one moment to refer to housekeeping problems?

(Pause.)

MR. AGEE: Coming back again to the original answer of Sears Roebuck & Co. to plaintiff's interrogatories sworn and subscribed to by Thomas Smith on the 31st day of January, 1973, Interrogatory 5:

"Has any employee, agent, officer or director of Sears during the period of 1957 through the present ever served as an employee, agent officer, or director of Whirlpool? If so, for each year;

"a. Identify each such person;

"b. State the nature of such person's work with Sears and the dates and places of the same;

"c. State the nature of such person's work with Whirlpool and the dates and places of the same;

"d. State whether such person continued to be in the service of Whirlpool during any time he was also in the service of Sears, and if so, specify such period.

"Answer: The following officers of Sears served as directors of Whirlpool from 1957 to the present."

There follow two columns, one indicating the Sears officer or director and the other column indicating the Whirlpool function which that same gentleman held.

3 "Answer: The following officers of Sears served as directors of Whirlpool from 1957 to the present:

"Sears	Whirlpool
"Edward Gudeman Vice President (retired) 925 S. Homan Ave. Chicago, Ill. 60607	Director - 1958-60
"Robert E. Brooker Vice President (to 1958) 925 S. Homan Ave. Chicago, Ill.	Director -1957-61 President - 1958-61

"Charles H. Kellstadt Director - 1958-60
President 1958-59 (retired)
Chairman 1960
925 S. Homan Ave.
Chicago, Ill. 60607

"George H. Struthers Director 1960-61
Vice President
(deceased)

"Arthur K. Walton Director 1961-65
Vice President (deceased
417 S. Prospect
Elmhurst, Ill. 60126

"Sidney L. Boyar Director 1965-72
Vice President-Factory Management
7401 Skokie Blvd.,
Skokie, Ill. 60076

"Sears has no information concerning which of its employees, officers or directors may have been employees of Whirlpool."

Interrogatory 9:

"Has any officer or director of Whirlpool had any

equity , debt or other interest in Sears? If so, state the identity of such person and the period, amount and nature of such interest.

"The holdings of record by Whirlpool officers or directors of Sears common stock from 1962 to 1972 is as follows:

"Sidney L. Boyar 1486 shares as of January 1, 1962
10,000 shares as of November 24, 1972

"Frederick S. Upton 942 shares as of January 1, 1962
1884 Shares as of November 24, 1972

"Robert C. Upton 918 shares as of January 1, 1962
1566 shares as of November 24, 1972."

Interrogatory 11:

"Has Whirlpool had any equity, debt or other interest in Sears? If so, state the period, amount and nature of such interest.

"Answer: From time to time Whirlpool has purchased short-term notes of Sears Roebuck Acceptance

Corporation and Allstate Financial Corporation, subsidiaries of Sears. The amounts applicable to the period after July, 1968 are as follows:

"Sears Roebuck Acceptance Corp.

Fiscal Period	Tot. Vol. Purchased (000)	Max. Bal. at any 1 time during Per. (000)	Disc. Rate High	Disc. Rate Low	Int. or Disc. Paid
2/1/72 to 9/30/72	$28,500	$15,000	4.550%	3.000%	$31,451.7
2/1/71 to 1/31/72	1,745	1,745	5.000%	4,875%	1,744.(
2/1/70 to 1/31/71	1,000	1,000	6.000%	6.000%	666.6
2/2/1/69 to 1/31/70	8,000	N.A.	N.A.	N.A.	N.A.
2/1/68 to 1/31/69	45,980	4,000	N.A.	N.A.	N.A.

"Allstate Financial Corporation

Year					
*1972	3,000	3,000	4.550	4.550	5,687.50
1971	None				
1970	2,200	1,000	8.400	7.500	2,189.02
1969	6,025	2,500	8.300	5.625	10,322.41
1968	4,100	2,000."			

And the interrogatory there again just to double back was:

"Has Whirlpool had any equity, debt or other interest in Sears."

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MR. AGEE: Interrogatory 23:

"Describe in full the functions and duties of Sidney L. Boyar as Vice-President - Factories of Sears, Director of Sears and Director of Whirlpool, respectively.

"Answer: As a director of Sears, Mr. Boyar attends meetings of the Board of Directors and considers and votes on matters presented at such meetings. As Vice President-Factories of Sears, Mr. Boyar supervises the operations of the Sears Factory Management Department, which reviews factories in which Sears has an investment to the extent necessary to form an opinion regarding the safety of Sears investment. As a director of Whirlpool, Mr. Boyar attends meetings of the Board of Directors and considers and votes on matters presented at such meetings."

If your Honor will give me just a moment, i think I can telescope this.

Interrogatory 28:

"Describe the nature of the commercial or other relationship or relationships Sears has had with Whirlpool during the years 1914 through the present.

"Answer: Sears has been a purchaser of merchandise from Whirlpool for many years. See also answers to Interrogatories 10 and 11."

Interrogatory 29:

"State whether the following statement, which is attributed to 'Elisha Gray 2d, Chairman of Whirlpool Corp.' and found in Home Furnish ing Daily, Friday, February 26, 1971 at page 16 was factually accurate at such time."

There follow four quotations as follows:

"Gray said Whirlpool's business with Sears Roebuck is growing steadily.

"Answer: The first statement attributed to Mr. Gray is factually accurate."

The second statement from Home Furnishings Daily:

"Whirlpool produces 7-1/2 million units, of which two-thirds are sold to Sears, he said.

"Sears maintains no records which would permit it to verify the second statement."

The third statement:

"He" -- that is, Elisha Gray -- said Sears and Whirlpool have had a a gentleman's agreement for the past 56 years with no formal contract binding them."

And the fourth statement:

"Both companies feel that the flavor of a relationship changes if it is based on legal terms rather than merit."

"With respect to the third statement, see the answer to Interrogatory 32-a and c. The remaining statement reflects Mr. Gray's opinion."

And with respect to the answer to Interrogatory 32-a and c that interrogatory is as follows:

"Describe in full the arrangements under which Sears has purchased of acquired vacuum cleaners, attachments, accessories and parts manufactured by Whirlpool during the period 1957 through the present including, without limitation:

"a. The date or dates of any arrangements or contracts or amendment thereto pursuant to which such purchases or acquisitions were made.

"c. State the contents or annex a copy of each such arrangement or contract or amendment thereto.

"a and c. There is no overall merchandise

contract. From time to time orders are placed by Sears with Whirlpool on Sears standard purchase form. These orders are much too numerous to enumerate by date, or to state the contents thereof."

Simply by way of clarification, that answer to Interrogatory 32-a and c was Sears' answer under oath to the earlier interrogatory which requested an affirmation of Mr. Gray's statement quoted in the Home Furnishing Daily to the effect that he said Sears and Whirlpool have had a gentleman's agreement for the past 56 years with no formal contract binding them.

Interrogatory 46:

"Has Sears given Whirlpool a general or other release? If so, state as to each such release:

"a. The date thereof;

"b. Whether it was a general or limited release;

"c. If limited, the limitations thereon;

"d. The identity of the persons at Sears and at Whirlpool who communicated with each other on the subject of such release;

"e. The reasons why Sears gave such release;

"f. The reasons, if any, why Whirlpool indicated it was giving such release;

"g. The principal situation which such release was designed to cover."

Interrogatory 47:

"Has Whirlpool given Sears a general or other release? If so, state as to each such release:

"a. The date thereof;

"b. Whether it was a general or limited release;

"c. If limited, the limitations thereon;

"d. The identity of all communications between Sears and Whirlpool on the subject of such release;

"e. The reasons why Sears requested such release;

"f. The reasons, if any, why Whirlpool indicated it was giving such release;

"g. The principal situation which such release was designed to cover."

The answer to both 46 and 47:

"No such releases were given by Sears or Whirlpool."

Interrogatory 72:

"Has John Inglis Co. Limited sold vacuum cleaners, attachments or parts to Simpson-Sears, Lted." If so, state:

"a. The identity of each model so sold;

"b. The annual dollar volume of such sales of each such model;

"c. The identify of each such model which was the same as or substantially similar to any model which Whirlpool sold to Oreck;

"d. The identity of each such model which was competitive with any model which Whirlpool sold to Oreck."

Answer:

"Sears does not possess such information."

Interrogatory 97:

"Do you conted that Sears has not increased its purchase of vacuum cleaners, attachments and parts from Whirlpool since Oreck's distributorship ended?"

Answer:

"Sears purchases have been increasing every year since Sears has purchased vacuums from Whirlpool."

Interrogatory 98:

"Do you contend that you never knowingly purchased from Whirlpool any goods at a lower price than the price at which Whirlpool was selling goods of like grade and quality to Oreck at or about the

same time?"

Answer;

"Sears objects to Interrogatory 95 as it relates to the period prior to July 28, 1968 and as it relates to goods other than vacuums. As to vacuums since July 28, 1968 Sears does so contend."

MR. AGEE: We have no further reading at this time from Sears' answers to interrogatories.

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MR. HOFFMAN: With your Honor's leave, I would read from the deposition taken of John Payne of Whirlpool on July 11, 1974. I will ask Mr. Agee to please take the stand and read the answers, and I will read the questions, as, indeed, I propounded the questions on that day.

THE COURT: Now, ladies and gentlemen, the

mp2

deposition is a transcribed examination of a witness who is under oath generally, and in this case Mr. Payne was appearing on behalf of the Whirlpool Corporation, and his testimony was taken in the law offices of Mr. Hoffman on July 11 of 1974, and Mr. Payne being put under oath at that time. You may treat this reading of this testimony just as if Mr. Payne were actually sitting in the witness box and giving you these answers to these questions at this very moment.

In order to keep the questions and the answers separate, Mr. Agee is going to read the answers as if he were Mr. Payne.

MR. TUROFF: May I have the page, your Honor?

MR. HOFFMAN: Page 351:

"Q The other day, Mr.Payne, I asked you whether you knew a company named Simpson-Sears, Ltd. and you knew its location, if I remember your testimony, as being in Canada, but you didn't know what it did, is that correct?

"A Yes, I know nothing about the company.

"Q Do you know whether or not the Whirlpool vacuum cleaner is sold in Canada?

"A Yes, Whirlpool vacuum cleaners are sold in Canada.

"Q Do you know whether the Kenmore label vacuum

mp3

cleaner is sold in Canada?

"A Yes, Kenmore label is sold in Canada.

"Q Do you know in what company or organization they're sold in Canada?

"A I don't know.

"Q Do you know anything about the volume of production of Whirlpool-made vacuum -- I withdraw the question.

"Do you have any idea of the volume of Whirlpool-manufactured vacuum cleaners which is sold each year in Canada?

"A No, I don't.

"Q No idea at all?

"A No.

"Q The great bulk of vacuum cleaners are sold domestically in the United States?

"A Yes.

"Q But you couldn't say how many are sold abroad or what percentage, is that it?

"A No.

"Q Have you ever heard of a company named Dustbane Enterprises, Ltd. of Ottawa, Canada?

"A Yes, I recall the name.

"Q In what connection do you recall it? Do you

mp4

have any recollection of Dustbane Enterprises in relation to the possible marketing of Whirlpool vacuum cleaners in Canada?

"A I recall the name.

"Q Do you recall that association with it, association being what I supplied in my previous question, as Dustbane becoming a possible distributor or marketer of vacuum cleaners in Canada?

"A Vacuum cleaner component and suction tools were inquired about by the Dustbane Company.

"Q Did Dustbane indicate a desire to market Oreck vacuum cleaners in Canada?

"A I don't know.

"Q Your recollection about their interest in marketing vacuum cleaners, tell us what that is, what is that based upon?

"A I saw a letter of inquiry from Dustbane to Whirlpool.

"Q Are you confident that the letter was addressed to Whirlpool?

"A I don't know.

"Q During the time when you were made aware of Oreck's desire to sell vacuum cleaners in Canada?

"A Yes.

"Q Do you know approximately when that was?

"A In 1966.

"Q Tell us what you recall about that.

"A Mr. Oreck introduced me to a man at a convention who had inquired from him about the purchase of vacuum cleaners for resale in Canada."

Now I will go to the top of page 355, where reference is made to a March 4, 1970, document of Whirlpool Corporation which has been introduced at the trial as Exhibit 32:

"Q I address your attention to page 3, the third page, you see the heading 'Engineering Statement' on the top of that page?

"A Yes.

"Q And then a few lines below that: 'CAP-33 powermate was reviewed and the following was agreed to: a. Obtain U.L. as well as CSA approval.'

"Does that mean anything to you?

"A Yes.

"Q Does CSA refer to the Canadian approval?

"A Yes.

"Q The agreement referred to in this phrase, 'the following was agreed to,' was this an agreement between officials of Whirlpool or Whirlpool and Oreck?

mp6

I address your attention to the first page which shows that you had as visitors at the time of this meeting report, Marshall Oreck and Robert Miller.

"A This was a summary of the items covered during our meeting.

"Q Meeting with the Oreck people, is that what you're saying?

"A Marshall Oreck, Robert Miller and the engineering and quality people present for Whirlpool.

"Q And it was agreed that you would obtain U.L. as well as CSA approval, is that right, for this CVP 33?

"A Yes.

"Q Then drop your eye down the page a bit, please, to the next underscored line: 'CVR-3000 upright was also reviewed, and the following was agreed to:

a. Obtain CSA as well as U.L. approval.'

"Is your testimony as to this the same as the previous item?

"A Yes.

"Q That is to say, you agreed to obtain Canadian as well as U.L. approval, is that right?

"A Yes.

"Q Then, if you will be kind enough, turn the page to item Roman Numeral E: 'Oreck presented a copy of the

University of California order for CVR 1000. Note they waived their 3 wire spec. to accept our 2 wire product.'

"In that, what I have just read, can you tell us who is referred to by the 'they' in 'Note they waived,' is that the University of California or is that Oreck?

"A I don't know.

"Q The next sentence: 'Therefore U.L. and CSA approvals should both apply to the CVR 3000 a a number will be sold in U.S. where 3 wire cords are specified.'

"Is the meaning of this sentence that U.L. and CSA approvals should be applied to both the 2 wire product and the 3 wire product?

"A I don't know.

"Q This is your writing, isn't it?

"A I don't know, it's vague.

"Q You mean your memory of it is vague?

"A Yes, and the writing, too.

"Q You don't mean the print on the page has faded?

"A No.

"Q Well, sir, it is the intention, is it not, of D, that Canadian approval should be obtained for the CVR 3000?

p2

"A Yes.

"Q And is the CVR 3000 a 3 wire product?

"A Yes.

"Q How about the CVR 1000, is that a 2 wire or 3 wire product?

"A That is a 2 wire product.

"Q Does the University of California order bring any recollection in your mind?

"A No, I believe I'm just repeating the information Marshall gave me as to a 3 wire prospective customer.

"Q It says Oreck presented a copy of the University of California order, does it not?

"A Yes.

"Q That means you must have seen it, isn't that so?

"A Yes.

"Q Do you know whether or not the order was filled, University of California order for CVR?

"A I don't recall.

"Q Do you know whether or not Oreck was ever given approval by Whirlpool to market vacuum cleaners in Canada?

"A I know Oreck marketed vacuum cleaners in Canada, and appealed for CSA approvals within the product so he could market them better. He had difficulty in marketing them in Canada without the CSA approval, but he

mp9

did sell some in Canada.

"Q Did the Whirlpool machines obtain CSA approval?

"A No.

"Q Do you remember why that was?"

* * *

"A Whirlpool advised me not to make the modifications, the final modifications necessary to achieve CSA approval.

"Q When you say Whirlpool advised you, do you mean corporate management?

"A Yes.

"Q Did they give you a reason for giving you such advice?

"A Yes.

"Q What was that, sir?

"A They had spoken to our John Inglis Division

mp10

in Canada and had decided after this conversation not to proceed with it.

"Q What was the John Inglis Division in Canada?

"A It's a subsidiary of Whirlpool Corporation.

"Q Is that a subsidiary that engages in the sale of vacuum cleaners in Canada?

"A I don't know.

"Q Do you know anything about John Inglis, what it does?

"A They manufacture Whirlpool branded products in Canada.

"Q Does their manufacture include the making of all of the Whirlpool appliances which Whirlpool makes in the United States?

"A I don't know.

"Q Do you know whether John Inglis manufactures and sells appliances to Sears or to Sears Canadian affiliates?

"A I don't know.

"Mr. Hoffman: Would you please mark this 17 for identification, copy of telegram, Payne to David Oreck, under date April 15, 1970."

Now, that marking was in the course of the deposition, and that telegram has become an exhibit for

mp11

the plaintiff in this case and has been received as Plaintiff's Exhibit 34. It is very short, and for the clarity of the question may I read this:

"I regret to advise you that I am unable to obtain a waiver to the current franchise to permit Canadian marketing."

"Q You notice in your telegram, the phrase: 'I regret to advise that I am unable to obtain a waiver to the franchise to permit Canadian Marketing'?

"A Yes.

"Q To what does that refer?

"A That refers to the CSA references in our earlier questions.

"Q CSA has something to do with a waiver to current franchises, is that what you're saying?"

MR. TUROFF: I am going to object. Mr. Hoffman has put in the telegram as his evidence. Now if Mr. Hoffman wants to say that telegram isn't so, that is up to him. But I think that would be improper.

THE COURT: Mr. Hoffman, I am going to exclude the question beginning on line 14 and the answer give you line 19. Start on line 20 with the question "Did you or didn't you?" You can read from there. I have not had any other objection yet called to my attention.

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MR. TUROFF: Your Honor, there will be an objection.

THE COURT: Then make it.

You were reading Question 2 on line 2?

MR. HOFFMAN: I may read the question on line 2:

"Q CSA had something to do with a waiver to current franchises, is that what you're saying?

"A No, the franchise and CSA didn't have any relationship to marketing. Oreck Corporation could market in Canada and did market in Canada irrespective of the franchise as mentioned here. It was my mistake using that term in advising Marshall and David that we could not proceed with the modifications for CSA."

Down to line 20, the question on line 20.

THE COURT: Yes.

MR. HOFFMAN: "Q Answer my question, did you or didn't you mean what you said, that youare unable to obtain a waiver to the current franchise to permit Canadian marketing?

"A I meant what I said but I was in error.

"Q You mean it wasn't true that you were unable to obtain a waiver to the current franchise?

"A Yes.

"Q You mean that it was true you could obtain a

mp13

waiver to the current franchise?

"A No waiver was necessary."

MR. TUROFF: Now, I object. We get to a whole colloquy with the witness, who is not a lawyer, about the legal effect of a document. I object to this.

THE COURT: This is his understanding. Overruled.

MR. HOFFMAN: "Q What is the reference to the current franchise, to what does that refer, the current franchise?

"A The franchise expiring December 31, 1971.

"Q That is the franchise of Oreck Corporation?

"A Yes.

"Q And is it a fair reading of what you say, regardless of what the real facts may be, that what you say is that you are unable to obtain from corporate management a waiver to the current Oreck Corporation franchise to permit Canadian marketing, is that what it means on its face?

"A Yes.

"Q Now you are saying you're mistaken, is that right?

"A Yes.

"Q And the mistake is that you could, in fact,

obtain such a waiver, is that what you're saying?

"A No.

"Q Means something else?

"A Yes.

"Q Could Oreck Corporation under the present franchise as it existed at the time this telegram was sent, have sold vacuum cleaners in Canada?

"A Yes, he could and he did sell some.

"Q Could he consistent with the distribution contract then in effect?

"A Yes.

"Q If that is so, what is this whole talk of waiver about?

"A It's a mistake on my part and inaccurate discussion of the CSA changes that we have been speaking about."

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mp13

* * *

MR. HOFFMAN: "Q When did you discover this mistake for the first time?

"A I don't know exactly.

"Q Was it here today?

"A No, it was before.

"Q Before today?

"A Yes.

"Q When did you last see this telegram?

"A On Monday.

"Q Of this week?

"A Wednesday of last week, I don't know.

"Q Where did you see the telegram?

"A Either in St. Paul or Mr. Turoff's office.

"Q And when you saw it, did you discover your mistake?

"A Yes.

"Q Did you discover your mistake at some point in time when you were discussing this telegram with someone else?"

Then I will skip the colloquy between counsel and go to line 7, page 365:

"A No.

"Q Did you discover this mistake when you were alone with the telegram, physically alone?

"A No.

"Q Was there someone else with you at the time when you discovered the mistake?

"A Yes.

"Q Who was that person?

"A My counsel.

"Q You have any recollection here now of whether on or before April 15, 1970, you discussed with corporate management of Whirlpool the question of whether or not it would be all right with Whirlpool for Oreck to market the Whirlpool vacuum cleaner in Canada?

"A I don't recall whether I discussed it.

"Q You don't remember one way or the other?

"A No, I don't recall. I don't retain the question, I am sorry, would you repeat the other one."

Then the question was read back by the reporter.

"A Yes.

"Q You did that?

"A Yes.

"Q And what did corporate management at Whirlpool say to you about that?

"A I don't recall.

"Q Do you recall that you talked to management about it, but you don't recall what management had to say about it, is that your testimony?

"A Yes.

"Q Your memory stops at the edge of what management

mp21

says. Do you recall what you said to management about it?

"A Management told me not to make the changes necessary for CSA.

"Q You know that now?

"A Yes.

"Q Did they say to you anything else?

"A Withdraw the CSA.

"Q Did they say why?

"A They said they had a conversation with the John Englis subsidiary and decided on that basis.

"Q On that basis not to perfect the application for CSA approval, is that it?

"A Yes.

"Q You say that this was a mistake. Suppose I read it to ou in a different way and ask if that corresponds better with what really happened:" --

THE COURT: Reading ahead here, I think the question is objectionable as to form, and the answer is, "I don't know." So I see no purpose in reading either the question or the answer. The same as to the next question, and the same as to the next question.

MR. HOFFMAN: I will go to the top of page 368, line 1:

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"Q But you do know you discovered you made a mistake. Tell us what your mistake was.

"A Reference toithe franchise in the wire was an error. The reference should have been to the modifications necessary to finalize and secure the CSA approval.

"Q Is one inconsistent with the other?

"A I don't know.

"Q If you don't know, how do you know this was a mistake?

"A My counsel advised me.

"Q Your counsel advised you to say this was a mistake, is that what you are telling me?"

There is an objection, and we go to the top of 369.

THE COURT: There is an objection to the question on line 5.

Do you have an objection to the question on line 5 of 369?

MR.TUROFF: Yes, I do.

THE COURT: Sustained.

MR. HOFFMAN: Will your Honor point out that the question on line 5 of 369 to which an objection was sustained was not a question that I had read to the jury or

mp23

been involved with?

THE COURT: I understand.

MR. HOFFMAN: 369, line 12.

"Q Sir, you knew on April 15, 1970, did you not, of the difference between a CSA approval and a current franchise, did you know that those were different things?

"A Totally different."

* * *

"Payne

* * *

MR. HOFFMAN: "Q Do you know whether or not CSA approval was obtained for Whirlpool vacuum cleaners sold to Simpson-Sears, Ltd. of Canada?

"A I don't know.

"Q Were you consulted about possible obtaining

mp25

of such approval for the sale of Whirlpool vacuum cleaners to Simpson-Sears?

"A No.

"Q In answer to the question I put to you a while back, you said that management instructed you not to proceed with CSA approval. Do you remember what specific representative of management it was, was it Elisha Gray?

"A No.

"Q Jack Sparks?

"A No.

"Q You don't remember who it was, is that your testimony?

"A Yes, I do.

"Q Who was it?

"A John Steeb."

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Q On Friday, Mr. Oreck, you testified about this box and its contents, the box having been marked as 105 for identification.

MR. HOFFMANN: I did not, however, at the time

offer it in evidence, and I do so now based upon the description in the testimony last Friday.

* * *

THE COURT: I will overrule the objection.

(Plaintiff's Exhibit 105 was marked for identification.)

xx Q I hand you Plaintiff's Exhibit 106 for identification. Notice, please, it states on the top the Oreck Corporation schedule of unit sales and increase over preceding year and percentage of change. Who prepared this document?

A This was prepared under my supervision from our books of account.

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Q Mr. Oreck, did your company keep records of the

number of units of vacuum cleaners which it had?

A Yes.

Q Which it had purchased from Whirlpool Corporation?

A Yes, sir, we do keep such records.

Q In respect of the first column, total all units sold, is that anything other than a summary of the units which had been purchased by Whirlpool and sold by it?

A That is a summary of the sales that we made; it is not a summary of our purchases, but this is the actual sales that we made.

Q Of vacuum cleaners?

A During the calendar years that are mentioned here. That comes right off our books.

Q Are the vacuum cleaners which are represented in that first column purchased from Whirlpool?

A Yes, they are all Whirlpool vacuum cleaners.

Q Now, the total of all units sold, in what books of account or records of the company are they to be found?

A I don't know what you mean.

Q Do you keep journals?

A Yes, our regular account records, which I understand are here.

MR. HOFFMANN: Do you care for anything more?

MR. TUROFF: The records ought to be put in.

MR. HOFFMANN: There is a Rule 1006, which expressly is designed to cover this situation.

THE COURT: Would you come up before the bar, please.

(At the bench.)

THE COURT: Is there something you are concerned with in these statistics?

MR. TUROFF: This witness has just established that he really does not know what books they come from. He could not even identify them.

THE COURT: He is the president of the company and he does not obviously sit down with the books; he has a bookkeeper, as I am sure you know; he has ledgers. I am perfectly willing in the interest of fairness to everybody to deal with something that is of real substance and concern.

MR. TUROFF: I would like to know as a foundation who it was that ook them off the books, who took the information from the books.

MR. HOFFMANN: The books of account are here and this is an extraordinary situation in this sense:

Whirlpool sold us the vacuum cleaners. They know how many they sold.

THE COURT: I don't want to get into that.

This is a question as to the disability of evidence.

(In open court.)

THE COURT: Who did the actual taking off of these figures?

THE WITNESS: My bookkeeping people did that.

THE COURT: What did you ask them to do?

THE WITNESS: I asked them to take off our actual unit sales and prepare them for the calendar year.

THE COURT: Who are your bookkeeping people? What are their names?

THE WITNESS: They are in New Orleans. Mr. Giglio, and so on, that regularly work on the books.

THE COURT: These are in-house people.

THE WITNESS: He is an in-house man, yes. The other figures are simple mathematics.

MR. TUROFF: I have no further objection.

(Plaintiff's Exhibit 106 was received in evidence.)

xx Q Looking at the chart, Mr. Oreck, would you tell us what the first column is designed to show?

A The first column shows the number of Whirlpool vacuum cleaners that we sold in each of these calendar years.

Q That is to say, the years 1967 to 1971?

A Yes, sir, the years '67 through '71, that five-year period.

Q Why did you begin the chart with the year 1967

A The year 1967 was the year that we were not fully in the mail order business, and the year 1968 is our first full year in the mail order business. It shows the change in the nature of our business.

Q Mr. Oreck, can you explain what is represented in the second column?

A The second column simply shows the increase in sales by units over the prior year.

Q How did you arrive at those figures?

A We arrived at that simply by subtracting the prior year from the present year and we got that differential. Those are the increments, increases in unit sales over the corresponding year.

Q This shows an increase from 1968 to 1969 and then a minor drop to 1970 and then an increase in 1971? Is that correct?

A Yes, sir. It shows these increases over these years.

Q As to the increase between 1969 and 1970, how do you explain that?

* * *

* * *

Q I address your attention to the third column. What does that represent?

A Those three figures there represent the percentage increase that we had in the years 1969, 1970 and 1971, represents an increase in 1969 of 76 per cent, in 1970 of 42.6 per cent, and in 1971 of 99.5 per cent, and those are increases in percentage over the prior years.

Q There seems to be no percentage increase betwee. the year 1969 and 1970. Why is that?

A We were in the mail order business and it is a testing process, so in 1969 we got a certain result, and in in 1970 to be sure we were on the right foot, because direct mail can be a treacherous business and you have to test it, so we were going in a plateau in our efforts, and we did increase, of course, from 27,000 to 39,000 units in 1970 over 1969.

3 Q Well, the three figures in the third column, percentage of sales increase over preceding year, are 76,42.6 and 99.5?

A Yes, sir.

Q Does that simply represent a percentage increase in sales over each preceding year?

A Exactly, represents the percentage of increase over the preceding year.

Q Do you know about how many mailings Oreck Corporation sent out in the year 1971?

A In the year 1971 we sent out 10 million mailings.

Q Friday you described your mailings as going to special groups of potential customers. To what classes of potential customers, if you can recall, did you send these mailings?

* * *

* * *

THE WITNESS: Well, sir, our mailings went to a wide variety of categories. It included professional people in the medical profession, engineers, and what-not, and we tested these groups and then we kept adding to them, and then we would repeat and go back to these groups, because if we found a group of people that seemed to be particularly receptive to our mailings, why, then, we would re-mail to them, because 95 per cent of those who received the mailing did not buy the first time but not everybody needs a product the same day, so we would go back and mail again, because we found that the initial response was good, and we knew when we mailed them again we would also get a very good response, and then, of course, we kept adding, experimenting first with other groups of potential customers,

and we added to our list as we went.

Q Then these 10 million recipients of which you spoke are not necessarily different persons?

A No, they are not 10 million different people; they are 10 million separate mailings to our own list of regular customers who purchased before. We might mail to them eight or nine or ten times during the course of the year. Even though they bought the first time, they are our customers in buying a second time, because they knew us and they were satisfied that we were okay to deal with, and they bought also from us dust bags and accessories and parts, together with the vacuum cleaner. So they were good repeat customers for vacuum cleaners, as well as parts and accessories to keep the present units going.

Q Does a dust bag last the same length of time as a vacuum cleaner?

A No, it does not. We found that our customer who bought a vacuum cleaner from us would purchase something over $4 per year in parts and accessories to keep the machine going. They would fill up the dust bag and replace it and so on, and that sort of thing.

Q What is the life of a vacuum cleaner?

A The life of a vacuum cleaner is 15 years, according to Whirlpool's figures that they gave me, and an average

life of 15 years.

MR. HOFFMANN: I offer 106-A, a page from the annual report of 1970.

(Plaintiff's Exhibit 106-A was marked for identification.)

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* * *

(Plaintiff's Exhibit 106-A was received in evidence.)

xx MR. HOFFMANN: On there appears a listing of appliances with the replacement life for each appliance, and one of them is vacuum cleaners, and the replacement life is indicated as 15 years.

Q Now, sir, in 1971 did Oreck Corporation have any long-range marketing plans, that is, marketing plans going past the immediate year?

MR. TUROFF: I am going to object that.

THE COURT: Come up to the side bar.

(At the side bar.)

THE COURT: In 1971 the contract had six months to go.

MR. HOFFMANN: It went through December 31 and he was not notified of termination until May of that year.

THE COURT: How does this kind of proof become admissible?

MR. HOFFMANN: The witness will testify as to his parameters, his expectations, and that is not to say we are going to ask for damages for the parameters of his expectations, but it does show the plan is reasonably based upon the evidence already in. I think it is important to show that it tends to bolster the solidity of his presentation as to damages generally, that he is not asking for the moon, that he did not preempt 50 per cent of the vacuum cleaner market.

MR. TUROFF: I think this is one of those situations where your Honor has power under 403-A to exclude. Here you are asking a man who has got a contract that says on its face it is going to expire on a given date to give a conclusion as to what he planned to do in the future. It seems to me that it so completely unreliable it should not be admitted. Moreover, Mr. Hoffmann says he is not putting it in as a predicate for damages.

MR. HOFFMANN: It is being put in as a predicate for setting forth the sales.

MR. TUROFF: It is a question of how many people would have bought them, not how many he wanted to sell.

MR. HOFFMANN: Your Honor, one prepares a case

and one can't produce all the pieces of his evidence simultaneously at the same time, so that we can satisfy our opponent as to what it will mean in the long push.

THE COURT: It seems to me that any statement of plan on his part is conjectural and speculative. We have a showing that he had a contract which was expiring; we have a showing of what his sales had been and so on; it seems to me to add on top of that some uncross-examinable statement on his part has a lot of risk. It does not lend itself to cross-examination.

MR. TUROFF: That is correct, your Honor.

THE COURT: How can you cross-examine?

MR. HOFFMANN: There is the matter of credibility. If this man is not shown to be credible --

THE COURT: Let me reserve decision on that question at this point. I am troubled by that.

(In open court.)

BY MR. HOFFMANN:

Q Now, sir, early in 1971 had Oreck Corporation bought these mailing lists about which you speak?

A Sir?

Q Had the Oreck Corporation early in 1971 bought these mailing lists of which you have spoken?

A Yes, we did buy mailing lists. There are

people in the field who deal in mailing lists, and any company in the direct mail business does business with these people.

Q Did you buy these lists designed in advance by the sellers as falling within the specific categories of potential purchasers?

A Yes, sir, the lists are identified either as to the work the people are in or the type of product that they themselves have previously purchased by mail. They are identified as to postal zone numbers or as to geography. You buy them for any specific area of the United States and Canada from the same people.

Q In buying mailing lists from time to time did you add on to your prior mailing lists new categories of potential customers?

A Yes, we did, we constantly added on and tested new groups. They are broken down into very finite groups. You can mail to veterinarians, you cam mail to people in the mortuary business; this is broken down very finely, each of these categories, and we had, in fact, only just touched the surface at our own particular mailing as we were going along here, as evidenced by the figures here. Why, we increased our mailing, I think, about three times in 1971 over 1970 and we just scratched

the surface there.

MR. TUROFF: I am going to object and move to strike the conclusion "we just scratched the surface".

THE COURT: Yes.

Q Had you by early 1971 purchased mailing lists for these many different groups that you had just described in your testimony, such as the moratoriums?

A We did purchase these lits on these various categories; we didn't purchase them all all; we were not in position to do so; we purchased as many as we thought were good and we tested them, and by the end of 1971 we had built up our regular customer list to close to a quarter of a million, regular customers who had bought something from us and who were then on our regular customer list.

Q How many times a year did you mail to the customers on the list?

A We mailed to our regular customers, we would mail to them anywhere from six to ten times a year. Our experience had been that our best customers were the people who had previously purchased from us. So we would mail to them more frequently and they would buy more vacuum cleaners, possibly for their own use or their friends, and they would also buy replacement bags so we

could just from our own regular mailing list, if, for example, we had a million customers on our regular mailing list, we could mail just to our own people maybe 10 million letters over the course of the year, and then we would buy extra and mail to the new list that we would buy, new names.

Q Is the vacuum cleaner industry big enough for all that mailing?

A Yes, sir, the vacuum cleaner industry in 1971 was about 7.8 million purchases; the vacuum cleaner industry has a saturation of 99.2 per cent of all of the wired homes in the United States, who own some kind of a vacuum cleaner, and approximately 10 per cent of the people that own a vacuum cleaner replace it or buy a new one each year, so the industry figures have since gone up to 9 million as high as 9 million sales per year.

The vacuum cleaner industry is, indeed, a very large one.

MR. HOFFMANN: Your Honor, I offer in evidence Plaintiff's Exhibit 107, a listing of total vacuum cleaners shipped by U. S. manufacturers from 1966 to 1975. It has been stipulated to by the other side as admissible.

THE COURT: It may be received.

(Plaintiff's Exhibit 107 was received in

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MR. AGEE: Does the Court wish us to make a part of the record the stipulation?

MR. TUROFF: We stipulate as to it.

THE COURT: If it is in evidence, it is in evidence.

MR. HOFFMANN: Could I ask the reporter to read the last answer back?

(Answer read.)

BY MR. HOFFMANN:

Q Do you know what position is preempted by your company? What percentage of the the vacuum cleaner market did the Oreck Corporation have in 1971?

A In 1971 we had then risen to approximately 1 per cent of the industry in our goal, which was attainable --

MR. TUROFF: I object.

THE COURT: Strike out what is attainable. I will permit him to say what was his goal.

THE WITNESS: Our goal was 4 to 5 per cent of the industry.

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* * *

xx Q Did you actually solicit business in Canada, the Oreck Corporation, did it actually solicit business in Canada?

A We did solicit business from the janitorial supply distributors, not too actively, but we did not actively solicit business from the consumers.

Q Why was that, sir?

A Because we did not have CSA approval, and if you do not have CSA approval you cannot sell in a mass volume in Canada, because CSA is a customer's assurance of safety, and if it does not have CSA approval you could not do a big business in Canada to the consumers, which is where the big volume is.

Q Was Oreck sending its direct mail to Canadian customers at that time, that is to say, prior to the end of January?

A No, we did not send mail to Canada, although it would have been easy to do so, since every concern we buy from has Canadian affiliations, but we did not feel it was prudent because we did not have CSA approval, and, accordingly, our sales results, which normally would have been the same, we would not expect to get the same because it did not have CSA approval

Q In your career as a merchandiser of household appliances, including vacuum cleaners, did you achieve a knowledge of consumer patterns in purchasing household appliances?

A Yes, I think I know a good deal about the sales of appliances and the like and the purchase patterns, and I could tell you that the Canadian market is exactly the same as the United States market. Every major company

in the United States has an office or manufacturing plant or stores in Canada. RCA does, Whirlpool does, Sears does. And, in fact, the television stations that border on the United States, the same advertising goes into Canada and so on. My experience is Canada has the same big potential relative to the population, which is one-tenth of the United States; has the same type of customers and the same buying habits and so on as in the United States. There is really no difference.

Q You say the population of Canada is approximately one-tenth that of the United States?

A Yes, sir, the population of Canada is 22 million of the last count; I think the population of the United States was 220 million. The buying potential in Canada is roughly 10 per cent of the United States, and you can project in a marketing business very easily on that basis. In fact, Sears does 10 per cent of the vacuum cleaner business in Canada.

MR. TUROFF: I am going to object to that, unless there is a foundation for the amount of business that Sears does in Canada.

THE COURT: On the present record strike that out.

MR. HOFFMANN: We served a notice to produce

on Whirlpool which had to do with the Sears business with Whirlpool, and in lieu of sending us the books and records, by agreement worked out with management a series of three calculations were prepared and submitted.

THE COURT: Do you have an exhibit that you wish to offer?

MR. HOFFMANN: I do intend to.

THE COURT: What is it?

MR. HOFFMANN: It is Plaintiff's Exhibit 109.

(Plaintiff's Exhibit 109 was marked for identification.)

xx MR. HOFFMANN: The foundation being what I just said, that it comes from the opposition.

MR. TUROFF: I have no objection to it.

(Plaintiff's Exhibit 109 was received in evidence.)

xx Q Mr. Oreck, will you look at 109 in evidence and tell us if you find support for your statement about Sears doing one-tenth of its business in Canada?

MR. TUROFF: I object.

THE COURT: It is there or it is not.

MR. HOFFMANN: Yes, it is, and I will read it.

The last page of 109 is entitled Summary of Volume, Unit and Dollar Amount of Vacuum Cleaners Sold to

Simpson-Sears, Vacuum Cleaner Shipments to Simpson-Sears, Canada, and under the year 1972 there appears total units of 71,837 and the second page of the exhibit is entitled Summary of Data setting forth volume and percentage of total Whirlpool production by unit and dollar amount of all vacuum cleaners sold to Sears, and under the year 1972, here the reference for total units is 731,000.

(Continued on next page.)

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THE COURT: 729.

MR. HOFFMAN: I am sorry, 929 Sears units.

THE COURT: In thousands?

MR. HOFFMAN: Yes, in thousands.

BY MR. HOFFMAN:

Q Now, you spoke of a conversion rate, that is to say a rate of returns and purchases from the mailings sent out by Oreck earlier in your testimony.

A Yes, sir.

Q Would you tell us what that rate was again?

A The conversion rate in 1971 was approximately seven and a half sales per thousand, or .75 was the conversion rate from our mailings in 1971.

That would mean that for every million mailings that we sent out we should sell 75,000 vacuum cleaners for each million mailings that we sent out.

Q In 1971 --

A That was the case in 1971.

Q In 1971 how many pieces of mail did you send out in the United States?

A The United States we sent out 10 million mailing pieces and, as the record shows, we did approximately 78,000 and some-odd unit sales. So our rate of conversation was approximately seven and a half or 7.8, I guess, units

per thousand mailed.

Q Are you saying that the results would be predictable at the same conversion rate of seven or so to a thousand if you had sold vacuum cleaners in Canada?

A Absolutely. We would have the same sales result, the same names are available to us from the same sources, as I mentioned, and for each million mailings that we would have made in to Canada we should have realized approximately 70,000 unit sales.

If we sent out one-tenth, as we would have done had we the CSA, we would have sold approximately 70,000 units in Canada in 1971.

If we sent out -- correction, I am sorry about that -- we would have received one-tenth of the results. If in the U.S. we mail out 10 million and got 78,000, then for one million in Canada, which would have been the correct ratio, we would have had 7800. If we mailed 30 million, it would have been three times that, and so on.

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Q Mr. Oreck, when you bought Whirlpool vacuum cleaners, where were they manufactured?

A In St. Paul, Minnesota.

Q When you purchased them, to what points were they delivered?

A Vacuum cleaners from St. Paul from Whirlpool were delivered to several points. They were delivered to Steubenville, Ohio, a warehouse we had there; they were delivered to Stamford, Connecticut. They were delivered to Indianapolis, Indiana, to Los Angeles, California, to New Orleans, Louisiana, to a great many points.

Q And when Oreck sold vacuum cleaners, did it sell vacuum cleaners from these warehouse points to customers in different States?

A Yes, sir, we sold in every State.

Q And do you know how many stores Sears has?

A Sears has over 900 stores according to their annual report.

Q Do you know where those stores are located?

A They are located in every State in the country and all over Canada.

Q Do you know who makes vacuum cleaners for Sears Roebuck?

A Whirlpool makes vacuum cleaners for Sears Roebuck.

Q Do you know where those vacuum cleaners are made?

A They are manufactured in St.Paul, Minnesota, and shipped from there to all these points.

MR. HOFFMAN: Your Honor --

xx (Plaintiff's Exhibit 60 marked for identification.)

MR. HOFFMAN: Because it is a bulky exhibit, your Honor, may I state some observable facts about it? It's 16 pages long.

THE COURT: Are you offering it in evidence?

MR. HOFFMAN: I am going to offer it, but I thought perhaps it might be necessary to describe it.

THE COURT: See if it is necessary to describe it, because if it goes in evidence it will speak for itself.

Any objection?

MR. TUROFF: Excuse me one minute.

It is a bulky exhibit and I must go through it.

(Pause.)

MR. TUROFF: I don't have any objection, your Honor.

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THE COURT: Received.

xx (Plaintiff's Exhibit 60 received in evidence.)

MR. HOFFMAN: I will read some parts of it clearly identifying what I am reading, your Honor.

On the first page of Plaintiff's Exhibit 60, a handwritten note to Jack Sparks:

"Please note attached. Pursuant to our offices' meeting conversation, do you have any further thoughts on how we might influence Oreck to stop this kind of advertising?"

Signed "John."

Q Mr. Oreck, do you know who that John is on the bottom of this handwritten note?

A John Platts.

Q How do you know that, sir?

A I recognize his handwriting.

Q The second page, "From Don Ranum to J. Platts, date 4/13.

"John" --

Pardon me, Mr. Oreck, do you know who Don Ranum is?

A A public relations fellow at Whirlpool in Benton Harbor.

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MR. HOFFMAN: "In the light of the conversation about Oreck, I thought you possibly would be interested in the attached."

And then "Mr. P-more anent Oreck - we received a letter from the Florida University Department of Consumer Protection complaining about Oreck and implying that this kind of solicitation was highly unethical. Then, just one day later, we got a letter from Sid Boyer in which he forwarded a letter from 'an old friend of Whirlpool' who had received an Oreck offer and also thought this type of selling gave Whirlpool a bad name."

Q Do you know who Sid Boyer is?

A Sid Boyer is on the board of directors of the Whirlpool Corporation and he is a vice-president of the Sears Roebuck Company.

MR. HOFFMAN: "In the first instance ask Mr. Ranum to reply to Florida University -- but give Mr. Boyer's to Mr. Willemin who said he'd 'answer in your absence.'"

And then, if I may characterize, your Honor, simply this: there is Oreck advertising attached and I shall not at this time read it.

Q In the midst of this exhibit there is a hand-

written note dated 4/13/71 followed by more Oreck advertising:

"Jack. Thought you might be interested in this promotion. Woolridge mentioned a while back that there was a problem here.

"No need to reply."

Do you know who Jack is?

A Jack would be Jack Sparks.

Q Do you know who Woolridge is?

A Woolridge would be the assistant to the chairman of the board, Mr. Gray.

Q Do you have any idea who the author Owen Skelton is?

A I don't know that.

MR. HOFFMAN: Your Honor, I think before I had marked as 160 a document which is entitled "Appraisal of Vacuum Cleaner Business By H. Thomas Stroop" under date of October 16, 1961.

Before offering it, I want to question the witness on the voir dire as to that. It will just be a few questions.

Q Mr. Oreck, I show you the document I have just described. Can you tell us what this is?

A This is a survey by H. Thomas Stroop, appraisal

of vacuum cleaner business of RCA-Whirlpool vacuumcleaner business dated October 16, 1961. It's an interoffice report by Mr. Stroop, who was then an employee of Whirlpool Corporation. And it describes their business and their future in the vacuum cleaner business.

Q How do you come by it?

A This was given to me by Jack Sparks.

Q Did it have the cover which is on the exhibit in the hands of the Judge at this time it was given to you by Mr. Sparks?

A Yes, that was exactly the one that was given to me, and Mr. Sparks said that he --

MR. TUROFF: I object to this.

THE COURT: Overruled.

A At this time that this was given to me Mr. Sparks said that he gave me the whole file on vacuum cleaners and he said that he felt that I would find this useful because this was Whirlpool's experience in the vacuum cleaner business, and since I was picking up where they left off, he gave me as much material as he could to show what their marketing studies had been and their advertising material, and so on and so forth, to assist me in getting started in the business.

He gave me this in 1963, I should say, about

April or May. I guess it would be about May of 1963.

THE COURT: Do you offer it in evidence?

MR. HOFFMAN: I now offer it in evidence, your Honor.

THE COURT: Any objection?

MR. TUROFF: Yes, I have an objection, and I would like to be heard, your Honor. I think we might take this up --

THE COURT: Yes.

Ladies and gentlemen, we will take our break.

(The jury left the courtroom.)

(In open court, jury not present.)

THE COURT: Now, what is the basis for the objection?

MR. TUROFF: Your Honor, this document on its face is dated October 16, 1961, almost two years before there is any contract or any agreement between Whirlpool and the Oreck Corporation.

I believe the contract in evidence, Exhibit 3, is August of 1963. It is almost two years before there is even an Oreck Corporation in existence.

In here, your Honor, there are certain statements which seem to me to be conclusions of Mr. Stroop, whom the evidence would show had a position in the

refrigeration division, about Sears' feelings about the vacuum cleaner business.

It seems to me that these statements, which are the conclusions of Mr. Stroop, coming as to what he evaluates Sears' feelings in 1961 to be, are both irrelevant and prejudicial.

Assuming for the sake of argument only that Mr. Stroop was accurate in his statements as to what Sears felt about pricing of vacuum cleaners and the vacuum cleaner market, tney certainly could not -- those statements could not form a basis for any evidence of a conspiracy or a combination between Sears and Whirlpool with regard to the Oreck Corporation which wasn't in contemplation, which didn't exist, as to which there had been no approach.

There is no way the jury could find without the sheerest speculation that those feelings of Sears continued. And it seems to me that those pages which relate to Sears and Sears pricing, which are irrelevant, become highly prejudicial in the minds of the jury.

I would be glad to refer, your Honor, to the specific pages that I have in mind. They are not numbered here and it makes it a little difficult. It is 14 pages in.

THE COURT: Let me ask you this: isn't it

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arguable that the Sears factor in this entire case Mr. Hoffman is urging here resulted in the phasing out of his client in 1971, was a factor throughout and this is some evidence of the fact that it was a factor throughout and never ceased to be a factor?

MR. TUROFF: Well, with all due respect to your Honor, I am sure Mr. Hoffman intends to prove on the basis of his cases that Sears was a factor in his client's being phased out. However, we are now looking at a report that is wricten by someone in 1961. Sears and Whirlpool couldn't have conspired and combined with regard to Oreck in '61 because there was no Oreck and Oreck had never been approached. There was no such business.

Now, when you take the statement here -- and I assume -- I don't know whose statement it is, it's in a cover, but the print is different from the other thing -- by a gentleman and they accepted the personnel records. this gentleman's function throughout his entire service with Whirlpool is in the refrigeration department. He has no function whatsoever with regard to vacuum cleaners, and he makes this kind of conclusory statement in 1961, I don't think that you can argue anything from it.

If the fact was that Sears made it known to Whirlpool that they didn't want anybody to go into the

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vacuum cleaner business in competition with them, then it seems to me that no one ever would have approached the Oreck Corporation and said, "Let's go into the vacuum cleaner business."

I don't think you can go back to a time period two years before anybody ever goes to Oreck and says, "What would you think about forming a sales company to sell vacuum cleaners," and then say that a statement in 1961, which, of course, may not be true in 1963, and certainly may not be true in '71, can be used as evidence of a conspiracy or combination with regard to Oreck.

You have to keep in mind that the conspiracy or combination which the plaintiff is required to prove in this case is a conspiracy or combination with regard to the plaintiff,Oreck Corporation. And it seems to me that this kind of thing, standing in this time period, by this type of individual, with this type of what is clearly a conclusory statement here is both irrelevant, without the time period and it is highly prejudicial to put in that kind of evidence.

MR. HOFFMAN: Your Honor, would you hear me for a minute?

THE COURT: Yes.

MR. HOFFMAN: First, I ask you to come with me

to a few references in the exhibit for identification. Under I would say about eight, maybe ten pages in, there is a page heading "Sears" that follows headings of other companies, Westinghouse, and the like. Unfortunately, they are not numbered pages.

Do you find it, sir? If I may, may I read it? It will save a little bit of time.

"Sears type of distribution, mail order and through stores, stores selling is a specialty selling with good salesmen and high commission. Unlike other appliances, Sears sells their cleaners for as high or higher prices than major brand competition."

Then the next page -- would it help if I counted the pages?

THE COURT: I think you will have to.

MR. HOFFMAN: Counting the cover it's --

MR. TAUCHE: The page you were just quoting from was page 14.

MR. HOFFMAN: Does that have "Sears" on top?

MR. TAUCHE: Yes.

MR. HOFFMAN: Thank you.

THE COURT: Yes, I have it.

MR. HOFFMAN: If you turn to the next page, 15, "Sears becomes very -- if RCA-Whirlpool product is retailed

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for less than the Sears product manufactured by Whirlpool."

Bear in mind, please, your Honor, that Whirlpool had been selling the RCA-Whirlpool products through various distributors throughout the United States. Its venture was unsuccessful and it came to Oreck in the first contract in '63.

"For this reason, we understand it has been decided that the RCA-Whirlpool branch should have retail prices that are comparable to Sears.

"Our challenges then ... 'can we sell cleaners in volume at high retail prices ... and if so, how?'"

In giving you these readings, I am just giving you the ones which we had this morning.

THE COURT: I will admit it. I take it in conjunction with the prior exhibit where it seems to me there was a memo from a Mr. Boyer who said he was not happy with certain advertising.

MR. TUROFF: But, your Honor, that's a 1971 memo.

THE COURT: I understand, but this showed Sears approached Whirlpool on selling. It was just prior and the attitude continued and Oreck happened to be the object of it in 1971, whereas Whirlpool itself had been the object

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of it in '61.

MR. TUROFF: Your Honor, I don't think Mr. Hoffman will contend -- and he will certainly correct me if I am wrong -- that Whirlpool told Oreck what prices to sell at. Oreck set his own prices for products. There is no such allegation.

THE COURT: I understand.

MR. TUROFF: But it seems to me, your Honor -- and I don't like to argue after you have ruled, but I would like to convince you -- that the jury would simply have to speculate here that something that arguably -- and I only say this for the sake of argument because I don't know who made it -- that Mr. Stroop says this in '61 before there is an Oreck Corporation, before there is a thought of an Oreck Corporation, before there is any thought of a vacuum cleaner, and it seems to me you are inviting the sheerest, most rank kind of speculation.

MR. HOFFMAN: Your Honor --

THE COURT: Wait a minute, Mr. Hoffman, please. Mr. Sparks gives this to Mr. Oreck, according to the testimony, presumably aware of the contents in 1963. I am not arguing -- I am just arguing the question of whether it is arguable or relevant to any issue, and it seems to me that as a statement of Whirlpool's awareness that Sears'

view about the selling of products manufactured by Whirlpool in competition with Sears --

MR. TUROFF: In 1961.

THE COURT: In 1961 -- and tied together with other evidence that is in this case, the jury can reasonably infer that Sears had not changed its mind over the ten years.

MR. HOFFMAN: Your Honor, there is --

THE COURT: Whirlpool was aware of that and perhaps more. I haven't yet gotten to the "perhaps more."

MR. TUROFF: It seems to me that what they are doing here, if they do that, is to make inference upon inference upon inference.

THE COURT: I don't see it.

MR. TUROFF: And you and I may disagree. You are on the other side of the bench.

THE COURT: I receive it.

xx (Plaintiff's Exhibit 160 received in evidence.)

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Q In the interest of time -- and we will perhaps come back to this, I will go on.

Now, you said that you made mailings during the period, I think, 1967 to 1971? Is that correct?

A We started our mailings in the end of 1967.

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Q You continued them throughout the period?

A 1971.

Q And you have continued them to this date? Is that true?

A We are mailing now, yes, sir.

Q What is your conversion rate today?

A It depends on your product.

Q Do you sell an upright vacuum cleaner today?

A We sell upright vacuum cleaners.

Q What do you call your upright vacuum cleaners? Us there a model designation of some type? Has it a name?

A It has a name.

Q What is the name?

A C. Oreck Vacuum cleaner.

Q Any number?

A We have several numbers.

Q What models?

A We have a model 4000.

Q What are the others?

A We have a Model 4300.

Q Any other?

A Tht is it.

Q Will you describe the Model 4000 for us?

A It is an upright vacuum cleaner with a revolving brush, lightweight.

Q What is the model of 4300?

A It is the same unit in different color, but with a three-wire grounded plug.

Q Would you say that the 4000 that you are selling today is roughly comparable to the 2000 CVR that you were selling for Whirlpool?

A No, they are different.

Q They are different? Which machine is better?

A Some people write us and say they prefer the Whirlpool.

Q I am asking you for your opinion?

A Well, wha-t I am eating from is what is best; right now I am eating from what I am selling.

Q And that is the CVR-4000?

A Yes.

Q Which has a longer warranty, the 4000 or the 2000?

A We put a longer warranty on the 4000.

* * *

Q Perhaps you can think about it and we will come back to it.

At some point Whirlpool stopped supplying you with canisters? Isn't that correct?

A That is correct.

Q When was that?

A Consistent with the new contract.

THE COURT: When?

THE WITNESS: The effective date of that would be in mid-1968. They said they would not make them any more.

Q At that point you went out and got yourself another canister source?

A Tank cleaner.

Q Canister source?

A I call it tank cleaner.

Q It is not an upright cleaner?

A No, sir.

Q And you sold it with attachment AP-18?

A Yes.

Q You sold it later with CAP-33?

A Yes, sir.

Q The source was Mastercraft Company for your

tank?

A Yes.

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Q You testified also that you spent $150,000 of your own money in connection with the promotion of the

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Whirlpool vacuum cleaner. Is that not a fact?

A Yes.

Q You didn't spend that before you signed the contract with Whirlpool, did you?

A Yes, I started to. I certainly did.

Q How much of it did you spend before August, 1963?

A I spent a good deal. I think I had 28 visits flying back and forth to the Whirlpool factory in the time that my -- when these contract negotiations were going on.

Q So you --

A I am not sure about the 28, but it was considerable.

Q All right. You spent your plane fare back and forth?

A I spent more than plane fare. I was unemployed and I was doing all of this without any compensation because I expected that my business would compensate me ultimately. I was living off whatever I had. I had no income.

Q I see. You testified you set up service offices for the Whirlpool vacuum cleaners; is that correct?

A Yes, sir.

Q How many did you set up?

A We had the RCA service company all over the United States or in every market that we would sell, we were doing service, and we supplemented the RCA service company service with local vacuum cleaner service technicians in every market that we were selling. That number varied because we didn't sell in all markets at the same time. So it's difficult for me to try to pinpoint exactly how many we had at any given time. Suffice to say, we had ample service in every market that we were selling in.

Q But the details, the number of that is something you don't know now?

A Oh, I think at one point we had as many as 600, but it depends on when you are going to take that period.

Q All right. You had service offices in 1971, did you not?

A Yes, we did.

Q Were those the same service offices you had in 1963 and 1964?

A No, they were not.

Q You didn't set up the ones that you had in 1971, did you?

A Sir?

Q You had no part in setting up the service offices

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that you had in 1971, did you?

Q Indeed I did.

Q You did? What did you do with regard to the service offices you had in 1971?

A We solicited them, we trained them. You see, we lost all the RCA service company offices.

Q I am asking you, Mr. Oreck, what did you do?

MR. HOFFMAN: I think the witness ought to be permitted to answer the question.

MR. TUROFF: I think the witness was using the term "we."

Q I want to know what you, Mr. Oreck, did.

A Me personally?

Q Yes you, Mr. Oreck.

A I set the policy. I had people working for me and salesmen in various areas of the country, people within my company, and we had a procedure and we went out and we solicited, we had a program, and we went out and we solicited people who were in the business of servicing vacuum cleaners.

We couldn't get Tech-Care Service, so we had to go and get our own.

* * *

wp11 Oreck-cross

* * *

Q In the period 1963 to 1971, where did Oreck

Corporation sell outside the United States?

A We sold to -- during this period we sold into -- aside from the United States, although I guess it's part of the United States now, Puerto Rico and Hawaii and we sold some units in Canada.

Q You sold 500 units in Canada in 1966 to Dustbane; isn't that correct?

A I believe that is what I testified to.

Q And I think you also testified you sold some more units to Dustbane in 1968; isn't that correct?

A Yes, sir, I believe that's correct.

Q And those units -- I show you Plaintiff's Exhibit 39 in evidence and ask you whether those units were sent to the Dustbane Company in 1968?

A Well, I read off these release numbers as best I could and they were sent, if you want me to read off dates, on 8/28, on 9/18, on 10/9, on 11/25, it looks like 11/28 and on 12/20, all in 1968. These were various shipments.

Q You also sold in the Bahamas, didn't you?

A I don't recall that.

Q You don't recall one way or another?

A No, sir, I don't. It's possible, but I don't recall.

Q That's outside the United States, isn't it?

A I believe so.

Q Dustbane; was that a janitorial supply distributor?

A They were in the maintenance company field. They were in the maintenance field. They were in the janitorial supply field. They had many different divisions. They were the largest company in Canada.

Q They weren't --

A Of that kind.

* * *

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wp15 Oreck-cross

* * *

Q Now, the CAP-33 to which you testified, that was sold by Oreck Corporation with a tank manufactured by Mastercraft; isn't that correct?

A Yes.

Q And that in order to get CSA approval for the CAP-33 the attachment and the tank had to be submitted as a unit to CSA. isn't that a fact?

A I don't know that that's a fact.

Q You don't know that that is a fact? Isn't it a fact that Mastercraft was supposed to submit this combined unit to CSA?

A I couldn't say offhand.

Q You don't know?

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wp16 Oreck-cross

A Not to my recollection. It's possible, but I don't recall it.

xx (Defendant Whirlpool's Exhibit G marked for identification.)

Q Mr. Oreck, I show you what has been marked as Defendant Whirlpool's Exhibit G for identification. I ask you if you have ever seen a copy of that before. And I refer your attention to the copy sheet at the bottom of the second page.

A (Examining)

Q I don't want to rush you, but have you seen that document before?

A I am reading it (examining).

I may have received this, but I do not remember previously reading it.

Q All right. And I call your attention to Paragraph B. Do you see that?

A Yes, sir.

Q Would you read that paragraph out loud, Mr. Oreck?

A "After final U.S. approvals are obtained proceed to supply samples of Oreck Corporation for submission to Canadian Standards Corporation in conjunction with the Mastercraft cannister."

wp17 Oreck-cross

Q Does that refresh your recollection concerning whether or not the CAP-33 was to be submitted by Mastercraft as a unit?

A I honestly don't recall.

Q You don't recollect?

A No.

Q That's another detail you don't recall?

A That's right.

MR. HOFFMAN: I object and suggest that question be withdrawn.

THE COURT: Yes, I sustain the objection.

Q Now, isn't it also a fact that you never had Mastercraft submit the CAP-33, plus the Mastercraft tank to the CSA?

A I have no recollection of that.

Q Is the CAP-33, plus the Mastercraft tank, approved by the CSA for sale in Canada?

A I don't know.

Q You don't know. Who took care of that?

A That would likely be handled by -- possibly by my brother.

Q I see. You don't know one way or another?

A No, sir, I don't.

Q I put it to you, Mr. Oreck, isn't it a fact that

wp18 Oreck-cross

your new product, the CVR-4000, doesn't have CSA approval, either? Isn't that a fact?

A I don't know. I think the manufacturer has applied for that.

Q Has applied. This is 1976. He has applied in 1976?

A I don't know he has applied in 1976.

Q You don't know he had CSA approval for it?

A I do not know that. I know the unit was previously sold in Canada some years under another name and usually the procedure is you just can resubmit under a new name. Sometimes the standards change over a period of time, which might require the manufacturer to resubmit new evidence.

At one time it had CSA -- the unit we are now selling. I don't know about right now.

Q Your Model 4300 you are selling now doesn't have CSA approval, either, does it?

A I don't know.

Q I see. You are selling the replacement for the CAP-33 attachment right now, Oreck Corporation is selling that right now?

A We are selling the attachment, yes, sir.

Q To be sold with the Mastercraft tank?

A To be sold with any tank.

wp19 Oreck-cross

Q I see. And that doesn't have CSA approval, either?

A I don't know about that. As a matter of fact, I think it does.

Q You think it does, but you don't know?

A I am not positive. We were so effectively blocked in Canada by Whirlpool, I haven't --

THE COURT: No. Strike that out, please.

Mr. Oreck, just listen to the question you are asked and answer that question and we will go on.

THE WITNESS: Very well.

MR. HOFFMAN: Part of the answer is retained.

THE COURT: I understand that.

All right.

Q Now, while we are on the subject of the CVR-4000, you couldn't remember some of the details, as I recall. You did say it has got a warranty that's twice as long. Isn't that correct?

A I don't say it was twice as long.

Q The warranty is twice as long as any warranty Whirlpool had, isn't it?

A I don't know. I told you what it was.

Q You don't know what the warranty is on the CVR-4000 now?

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wp20 Oreck-cross

A Yes, I told you, didn't I, it's six months for commercial use.

Q And two years for domestic?

A That's correct.

Q But the motor would last twice as long, won't it?

MR. TUROFF: Can I have the last question and answer read back?

(Read.)

A We warranted twice as long and the factory life tests on that unit suggested it will last twice as long, but we warranted that it will -- we warranted for two years as against one year in home use.

* * *

* * *

Q Mr. Oreck, before we recessed for lunch I asked you about the current conversion rate for Oreck Corporation and I think you said that you would have to think about that.

Have you had time over the lunch period to think about it?

A Yes.

Q And what is the current conversion rate for Oreck Corporation?

A Our current conversion rate is something in the order of 4. That would be .4.

Q .4. And for the year '75, do you know what Oreck Corporation's conversion rate was?

A I would guess that it would be slightly less than that.

Q I see. In the years '72 to the present has it ever been more than that, .4?

A We have never done as well as when we had Whirlpool.

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wp2 Oreck-cross

Q Mr. Oreck, when you were the distributor for Whirlpool in the year 1971 were you the world's largest seller of top fill upright vacuum cleaners?

A Probably, because the only competition was Sears and they did only about 30,000, or thereabouts, units in 1971.

Q Today you are the world's largest seller of such uprights; isn't that true?

A We believe so.

Q And you advertise yourself as such; isn't that true?

A Yes, we do.

* * *

* * *

Q I believe you testified that you didn't know until June of 1968 that Whirlpool was considering terminating the contract that you entered into in 1963; is that correct?

A I believe that's correct.

Q You had no indication whatsoever prior to that that Whirlpool might elect to bring the agreement to an end at the end of the first five-year period?

A No. I knew of no reason and no one told me so.

Q Isn't it a fact, Mr. Oreck, that you had a meeting in Benton Harbor, Michigan, on September 2, 1966, with Mr. Sweet, at which time Mr. Sweet advised you that Whirlpool was considering terminating the arrangement at the first available date?

A No, sir, I recall no such conversation.

Q When you say you don't recall, you mean you don't recall one way or another?

A I was never told that to the best of my recollection by anyone.

Q You were never told that by anyone. I assume that at some point you were told?

A Well, I was ultimately told, but it was then an

wp5 Oreck-cross

accomplished fact.

Q But in fact the time was in June?

A I was not warned. No one ever said, "If you do thus and so we can remedy this."

MR. TUROFF: Mr. Dorsa, this is Defendant Whirlpool's Exhibit I for identification.

xx

(Defendant Whirlpool's Exhibit I marked for identification.)

MR. TUROFF: I have a copy for your Honor if you wish.

Q Mr. Oreck, I show you what has been marked Defendant Whirlpool's Exhibit I for identification and ask you if that is a true copy of a letter to yourself dated January 22 1968, from Sol Sweet?

A I presume this was sent to me.

Q And you received it, did you not?

A I believe so. I am not positive, but I think it looks --

Q Would you read to the ladies and gentlemen Paragraphs 3 and 4 of this letter?

A "In regard to your comments that you were going to add two salesmen and a sales manager to improve your vacuum cleaner sales program effort I want to confirm our understanding to you that the addition of these people is

entirely your own decision and that under those circumstances it doesn't mean that your franchise will automatically be extended beyond its present time.

"We agreed to take a reading on July 1, 1968, as to your going weekly sales rate and discuss our decisions with you at that time.

"With all good wishes, I am sincerely yours."

Q After reading that letter, do you wish to change any of your testimony?

A No, sir, I do not.

Q The date on this is January 22, 1968, is it not?

A Yes, it is.

Q After you were notified of termination you requested a new agreement, did you not?

A Yes.

Q And a term of three years was ultimately agreed on?

A Yes.

Q And after three years was offered to you you asked for the Christmas business of 1971?

A I asked for everything I could get.

Q And you got the Christmas business of 1971, didn't you?

A Yes, sir.

Q Which took you to December 31, 1971?

A That is correct.

* * *

* * *

* * *

Q I show you what has been marked Plaintiff's Exhibit 3, which is, I believe, the 1963 agreement between Whirlpool and Oreck Corporation, is it not?

A Yes, sir.

Q You had an attorney when you signed that one, didn't you?

A Yes, I did.

Q What was the name of that attorney?

A I believe his name was Mr. Fishman.

Q And he was with the firm of Kaye, Scholer, Fierman, Hayes & Handler, was he not, here in New York?

A Yes, sir.

Q That's here in New York?

A Yes, it is.

Q And I believe you testified on Wednesday, Mr. Oreck, that you didn't have an attorney when you signed the 1968 agreement?

A That isn't quite what was said, sir.

MR. HOFFMAN: Your Honor, may I just suggest that when counsel makes a statement about prior testimony it is his representation that that is the testimony?

THE COURT: Oh, yes. Ultimately it is the jury's recollection of the evidence.

Q Do you have a different recollection than I have?

A Yes.

Q What is your recollection?

A I said that I did not consult with an attorney before signing the general release because I felt that there was no sense in doing it, I had a gun to my head.

Q Mr. Oreck, again I call your attention to your deposition of December 19, 1973, to which we referred this morning. Do you remember that?

A Yes, sir.

Q You again remember that you were under oath when you so testified?

A Yes, sir.

Q And you signed the transcript of this deposition on June 14th; isn't that correct?

A If I did, it's there.

Q Okay. And I refer you to page 242, beginning on line 5.

MR. TUROFF: I believe the Court has a copy of the deposition.

Q "Q Throughout the period of those negotiations of the time that you executed the 1968 agreement of the release, which is Defendant's Exhibit 4 for identification,

you were represented by counsel, were you not?

"A Yes.

"Q What was the name of your attorney at that time?

"A Mervin Rosenman."

Is that testimony accurate?

A Yes, I think that was accurate.

Q So do you wish to change your testimony now about now having an attorney?

A No. Let me say this: insofar as the release was concerned, which is what I was referring to, I did not show that to my lawyer because there was nothing that could be done about it.

MR. TUROFF: Mr.Dorsa, I hand you Whirlpool's Exhibit H for identification.

xx (Defendant Whirlpool's Exhibit H marked for identification.)

MR. TUROFF: Your Honor, I have an extra copy for you.

Q I show you the document which has been marked Defendant's Exhibit H for identification and ask you if that is a true copy of a letter dated August 23, 1968, which you sent to Mr. Sweet and Whirlpool Corporation.

A (Examining) Yes, I sent that.

Q And that agreement refers to the negotiations leading up to the 1968 contract, which is Exhibit 44 in evidence; isn't that right?

A That is correct.

MR. TUROFF: Your Honor, I offer Exhibit H in evidence.

MR. HOFFMAN: No objection.

THE COURT: Received.

xx (Defendant Whirlpool's Exhibit H received in evidence.)

MR. TUROFF: Your Honor, I would like permission to read the last paragraph on page 2 of this letter.

(Mr. Turoff read from Defendant's Exhibit H in evidence.)

Q As a matter of fact, Mr. Oreck, you did discuss this with your attorney, didn't you?

A I did not discuss the final document that came to me. I did not discuss it and when I discussed this with Mr. Sweet on the phone he said, "There is no sense in talking more about changes. Either sign it or forget it."

Q Well, as a matter of fact, they made the request -- they made the change in the release requested by your attorney, didn't they?

A I don't know whether they made all the changes or not.

MR. TUROFF: May we have Exhibit 44?

THE COURT: No, that is not the answer.

A I do not know whether they made all the changes or not. When they sent it back to me after my telephone conversation --

THE COURT: No, please, Mr. Oreck, answer whether they made the change at the bottom of page 2 of Exhibit H in evidence.

THE WITNESS: I don't know, your Honor.

THE COURT: Well, the exhibit, I suppose, will reveal it.

MR. TUROFF: Yes. Counsel has the original.

THE COURT: Is that Exhibit 44?

MR. HOFFMAN: 44.

MR. TUROFF: Exhibit 44.

Q I show you Exhibit 44 for identification and ask you if in the "Now therefore" paragraph at the end it contains the words"other than with respect to the agreement dated August 1, 1968, between Oreck and Whirlpool?

A Yes, it does say that.

Q Thank you, sir.

As a matter of fact, Mr. Oreck, isn't it true

that when you were testifying on Wednesday, you didn't have an attorney with regard to the release Mr. Rosenman was sitting right here in the back of the courtroom?

A I don't know whether he was or not.

Q You didn't see him at all that day?

A I saw Mr. Rosenman here, but I have been a week in testifying. I don't know what day and what hours he was here when I was testifying. He was here for a few hours one day and I don't recall which day that was.

Q Also, Mr. Oreck, you testified to a conversation with Mr. Payne after you were advised that Whirlpool was not going to renew the 1963 agreement. Do you recall that testimony?

A Yes.

Q And isn't it a fact, Mr. Oreck, that Mr. Payne told you he had no idea why you were being terminated?

A That was part of what he said, yes.

Q And he indicated to you that he could not only make assumptions about it; isn't that true?

A He told me what he thought.

Q What he thought, but he indicated he didn't know; isn't that correct?

A I really don't --

Q You just don't know?

A I couldn't get it down to that fine a degree.

Q Again I refer you to the deposition transcript, Mr. Oreck, and read page 226, commencing at line 11:

"Q What did you say to Mr. Payne and what did Mr. Payne say to you?

"A Mr. Payne said to me that he had heard of Whirlpool's intention to cut us off and that he and other members in St. Paul were flabbergasted at this. He said that we were one of the best customers he had and he covered other contract customers, I guess. He said that he and the others there were flabbergasted, they could not understand why this action should be taken. He felt that someone up at the top had it in for us. I asked him at the time why this was being done. He said that he had no idea; that there was certainly from his standpoint no good reason for that from his standpoint because we were growing and we were a good customer and he had no problems with us whatsoever, that our service to them was excellent and that, as shown, we had no service complaints outstanding and that the only thing he could assume from this is that it appearently involved people at the top from Sears."

Do you recall that testimony?

A Yes, sir.

Q Is that an accurate statement of the conversation that took place?

A Yes, I think that is quite close to it, yes, I think that is quite right.

Q You testified concerning the business of mail order sales. Do you recall you testified to some conversation or a conversation with Mr. Payne in late 1967 concerning mail order?

MR. HOFFMANN: What is the page?

MR. TUROFF: I will give you the page. I am sorry, I can't give you the page right now; I don't have the entire transcript.

Q Do you recall testifying to a conversation with Mr. Payne in 1967 concerning Oreck's mail order sales?

A Yes, sir.

Q He said the people didn't like it? Do you recall that?

A Yes.

Q You referred to other customers?

A Yes.

Q Isn't it a fact that what Mr. Payne said to you was that he had had many complaints from your other customers?

A No, sir.

Q In fact, there were complaints from your other customers, weren't there?

A There were some complaints because we were selling it close to their costs and they didn't appreciate that.

Q In other words, you had janitorial supply people stock up on vacuum cleaners and then your mailers went out and cut the price on them?

A When we found we could not be competitive in the field --

MR. HOFFMANN: I object to this question. No foundation.

THE COURT: Read the question back, please.

(Question read.)

A The complaints that we had from our janitorial wholesalers was that we were selling directly to the consumer at a lower price. The complaint that Mr. Payne was referring to me and that I testified to was that the other customers at Whirlpool complained of our mailings.

Q He never discussed with you the complaints of your distributors?

A Oh, he may have mentioned it to us, but not in that conversation. I was aware of that complaint, yes, sir.

ms7

* * *

Q I believe that you testified that you made your last purchases from Whirlpool Corporation of vacuum cleaners in December of 1971? Is that correct?

A Those were the last shipments made to me. My purchases were made well before that time.

Q You received your last shipment of vacuum cleaners from Whirlpool Corporation in December of 1971? Is that correct?

A I believe that is correct, sir.

Q And you had been told prior to that that you would have to order, give shipping releases and pay for any inventory you wanted prior to December 31, 1971? Isn't that a fact?

A No. To be exact about it, Mr. Steeb's letter to me said they would have to be shipped and invoiced by December 31, 1971.

Q Now, in connection with the purchase of vacuum cleaners in the last half of 1971, Whirlpool extended credit to you, did it not?

A Yes.

Q It extended what is called a line of credit?

Isn't that also true?

A Correct.

Q Is it fair to say that in a line of credit you can borrow up to the sum which is the top line -- I shouldn't say borrow -- isn't it fair to say that you can buy goods on credit up to a certain amount?

A In the discretion of the credit department.

Q And your line of credit with Whirlpool Corporation in the last half of 1971 was $200,000, wasn't it?

A So I understand.

Q You mean you don't know?

A Well, they gave me more credit than that.

Q How much more did they give you than that?

A I would say at times the line went 30, $40,000 more than that, I believe.

Q In the last part of 1971?

A I would say that it was somewhat more than $200,000.

Q That meant you could have vacuum cleaners shipped to you having an invoice price in excess of $200,000 and you could owe the money to Whirlpool?

A Yes, sir.

Q As a matter of fact, Whirlpool shipped out all the vacuum cleaners for which you could pay up to your line

of credit and in excess of that up through December 31, 1971? Isn't that true?

A Yes.

Q And when you got down to December 31, 1971, you owed Whirlpool over $220,000 for vacuum cleaners which had been sold to you prior to December 31, 1971?

A Something in that area.

Q And you didn't pay it, did you?

A No, sir.

Q As a matter of fact, Whirlpool had to sue you to get it?

A Yes.

Q It is a also a fact that Mr. Payne prior to December 31, 1971, kept asking you for shipping instructions so that the vacuum cleaners which Whirlpool had in inventory could be shipped out?

A No, that was up to the credit department.

Q Didn't Mr. Payne ask you to send them shipping orders?

A He had shipping orders, yes, sir.

THE COURT: No, no, the question is, did he ask you to send shipping instructions?

A I don't recall whether he asked us for shipping instfuctions or not. He would be the man normally who

would give them.

MR. TUROFF: Mark this Whirlpool's N for identification.

(Defendant Whirlpool's Exhibit N was marked for identification.)

xx Q I show you a document marked Whirlpool's Exhibit N for identification and ask you if that is a true copy of the telegram of Mr. Payne to yourself dated October 18, 1971?

A I don't remember it, but it is possible that we received it.

Q Did you receive it?

A I don't remember specifically, but it is possible I could have received it.

Q You have no reason to believe you did not receive it?

A I just don't happen to remember that telegram?

MR. TUROFF: I ask that that Exhibit N be received in evidence.

MR. HOFFMANN: No objection.

(Defendant Whirlpool's Exhibit N was received in evidence.)

xx (Mr. Turoff read from Defendant Whirlpool's Exhibit N in evidence to the jury.)

* * * * * * * *

Q As of 1972 Oreck Corporation had Whirlpool CVR-2000 vacuum cleaners in inventory, didn't it?

A Yes, sir.

Q And Oreck Corporation sold the CVR-2000 vacuum cleaners to the public in 1972, did it not?

A Yes, sir.

Q And Oreck Corporation advertised Whirlpool CVR-2000 vacuum cleaners to the public in 1972, did it not?

A To a certain degree.

Q But you did advertise it?

A Yes, we did some advertising. We cut it down a lot.

Q And then Oreck Corporation also had CVR-3000 vacuum cleaners manufactured by Whirlpool in inventory throughout 1972, did it not?

A We had CVR-3000's in 1972. Whether or not we had them throughout the whole year I don't recall.

(Continued on next page.)

T2

Q As a matter of fact, you had the CVR-3000 in inventory as late as late as December, 1973, didn't you?

A I don't know if we did. We may have had some. We parcelled them out very slowly, knowing we could not get any more.

Q You may have had some?

A Yes.

Q You don't recall?

A I don't recall definitely. It is entirely possible that we did have some. We kind of parcelled them out slowly.

Q And as late as December, 1973, Oreck Corporation had CAP-33 attachments in inventory, didn't it?

A We may have had some.

* * * * * * * *

Q Now, MacDonald Sales Company in 1966 had gross sales which were greater than the gross sales in dollars of Oreck Corporation? Isn't that correct?

A I think so.

Q And that is true for every year from 1966 to the present? Isn't that a fact?

A Yes.

MR. HOFFMAN: I object. It has no possible relevance.

THE COURT: Overruled.

Q It is also a fact, Mr. Oreck, that as of December, 1973, Oreck Corporation still had Whirlpool parts in inventory? Isn't that a fact?

A December, 1973?

Q Two years after.

A Yes, we had Whirlpool parts.

Q As a matter of fact, Oreck Corporation has Whirlpool parts in inventory today?

A Yes, we have them; we pay a premium to get them.

Q Not from Whirlpool?

A No, we have to pay a premium to others to get them.

Q Now, some time after December, 1971, Whirlpool

purchased 8000 of the CAP-33s from Mastercraft?

A Whirlpool purchased from Mastercraft?

Q Some time after 1971 Oreck Corporation purchased 8000 CAP-33s from Mastercraft?

A It was approximately that number.

Q That was just about the entire inventory of CAP-33s that Whirlpool had in December, 1971?

A It is all that Mastercraft could buy.

Q Would you please answer the question?

A Well, I don't know how many you had, but it is all they could buy.

Q You don't know how many Whirlpool had in inventory?

A No, sir, I don't know how many you manufactured after our arrangement.

Q I asked what the inventory was on December 31, 1971.

A Of Whirlpool?

Q Let us start this over again. I thought you testified previously that you knew what the inventory of Whirlpool vacuum cleaners at Whirlpool on December 31, 1971, was because Mr. Payne sent you the production or inventory report?

A Yes, I knew that.

Q How many CAP-33s did Whirlpool have in inventory on December 31, 1971?

A At that time they had about 8000.

Q And then you purchased 8000 from Mastercraft?

A That was approximately right.

Q The price that you paid to Mastercraft was less than the price you paid to Whirlpool?

A Yes, substantially.

Q And Mastercraft was your source for tanks at that time?

A Yes.

Q And they are still your source for tanks today?

A Yes.

Q You also bought after 1971 1500 of the CVR-3000 machines from Mastercraft?

A That is approximately right.

Q How many CVR-3000 machines did Whirlpool have in inventory on December 31, 1971?

A I would estimate something under 2000.

Q I put it to you that it was approximately 1500? Does that comport with your recollection?

A That could be.

* * *

Q It is also a fact, Mr. Oreck, that between 1964 and 1968 Oreck Corporation had credit problems with Whirlpool, didn't it?

A No.

Q Oreck Corporation didn't pay all of its bills on time, did it?

A Oreck Corporation had disputes, but they were not in default. Oreck Corporation could not get their warranty paid and Oreck Corporation could not get delivery as promised; Oreck Corporation had epidemic failures of machines, over 20,000.

THE COURT: Wait, please. The answer is very simple and does not admit of just going on. You say the answer is no, no defaults?

THE WITNESS: No.

THE COURT: Strike out everything beyond that, please.

Q Wasn't there a time in 1966, Mr. Oreck, when the Oreck account was in default and Whirlpool Corporation asked Oreck to convert $100,000 of certificates of depos that Oreck Corporation was holding?

A Oreck Corporation was in dispute and Oreck Corporation was asked to convert securities of some sort, yes.

Q And you wouldn't do it; isn't that correct?

A We didn't do it, no.

Q And whether you call it in dispute or default, you didn't pay the bills that were due, isn't that correct, at the time they were due? Isn't that correct?

A I think there is a big difference, but we didn't pay for something that didn't work.

Q And, as a matter of fact, you had numerous conferences with the credit people at Whirlpool in which they asked you to pay your bills; isn't that true?

A I knew them well and I talked to them regularly, yes, sir.

Q And they often asked you to pay your bills, didn't they?

A Yes, sir, and we always did.

Q Eventually.

A Always paid.

Q Not when they were due.

MR. HOFFMANN: I object. This is rambling, your Honor.

THE COURT: I think the facts are established.

MR. TUROFF: All right, your Honor.

Q Yesterday, Mr. Oreck, I believe you referred to Plaintiff's Exhibit 60 in evidence which consists of some mailers. I will show you my copy, but perhaps counsel has the original some place you could look at.

Do you remember that?

A I remember this exhibit, yes.

Q If you turn to the second page of that exhibit, you will see there is a note from Don Ranum?

A To John Platts?

Q Yes. Do you see that?

A Yes, sir.

Q At the bottom it looks like a typewritten notation that looks like perhaps it has been stapled onto it.

A I see that.

Q And that notation refers to a letter from the Florida University Department of Consumer Protection, does it not?

A Yes, sir, it does.

Q Do you know what that letter from the Florida University Department of Consumer Protection was about?

A Well, I know what it says here.

Q No, that is not what I asked you.

A I don't -- I see what it says.

Q No. Were you made aware of what complaint the Florida Department of Consumer Protection had?

A I am not sure that I was. I wasn't made aware of every complaint that we ever had. I can only say in this regard that ever complaint we had was always resolved.

Q So you don't recall whether or not you were made aware of the nature of this particular complaint?

A I don't recall that specifically. I might refresh my memory if I looked at something, but I don't recall that specifically at this point. It's a few years ago.

MR. TUROFF: Mr. Dorsa, Whirlpool Exhibit X for identification.

(Defendant Whirlpool's Exhibit X was marked for identification.)

xx Q Mr. Oreck, I show you a document which has been marked Whirlpool's Exhibit X for identification, a letter from the Florida Agricultural Extension Service dated

April 2, 1971, from Miriam Harrison, consumer educational specialist, and ask you if you have ever seen a copy of that letter.

A It looks familiar to me. I don't recall when I saw it, but it does look familiar to me. I may have seen it in connection with this case here. I am not sure.

Q Did you see it in connection with anything that Whirlpool sent to you?

A I can't honestly say that I remember that.

Q You don't remember one way or another?

A No, I don't honestly remember one way or another right at this point.

MR. TUROFF: Your Honor, since the witness is fuzzy on this, I will not offer X at this time.

Q I think you still have 60 up there. There are some mailers -- I call them mailers -- there is some advertising literature attached to Exhibit 60, is there not?

A Yes, sir.

Q When Oreck Corporation sent out advertising, mail advertising, what did that mail order advertising consist of?

A It consisted of a letter, it consisted of a

two-color specification sheet that showed a picture in detail of the product. It contained an order card and it contained a postage paid return envelope. I believe that that was the contents of it.

Q Weren't most of your mailings from Oreck Corporation in that same form, that is, a letter and an envelope and a flyer for the product?

A I would say yes, sir, that's probably right.

Q And the form of the letter was almost exactly the same in every case except it is directed to a different specified group; isn't that correct?

A The form was very much the same.

Q And, as a matter of fact, the form is very much the same today, is it not?

A The form is similar. There are changes in it, of course.

Q Obviously they have to refer to a different product today.

A If you say form --

Q The contents of the letter.

A The content is different in today's letter as against the letter sent out here. If it is the way it is set up on the page, if that is what you mean by form, yes, sir.

Q You say something to the effect it is an important notice to real estate executives, or whatever group it is, don't you?

A Yes.

Q And you still offer to sell the product at half price, don't you?

A No, sir.

Q You do not?

A No, sir, we don't.

Q If not exactly half price, you offer to sell it at a reduced price today, don't you?

A I don't believe we say it's a reduced price, do we?

Q Well, I will show you Exhibit U in evidence and ask you -- and that was identified, wasn't it, as one of your current mailers?

A Yes, sir.

Q And it gives the price on the front page, doesn't it?

A Yes, it does.

Q What is that price?

A That price is 59.60 and there is no comparative price on that at all.

Q And the mailer is attached to the letter, isn't

it?

A Yes.

Q On the back of the mailer down at the bottom it says, "Price Guide."

A Yes.

Q And what does the price guide say?

A The price guide is 99.30.

Q You also refer in your current mailer to use by hotels of this vacuum cleaner, don't you?

A Yes, sir, we do.

Q And you refer in the Whirlpool mailer to use by hotels, do you not?

A Yes, we refer to hotels in here. Not in the same form or context or layout as the other one, but we do refer to them, yes.

Q Other than the letter from the Florida Consumer Protection lady, which we discussed, did you get any other complaints from consumer groups or consumers concerning Oreck advertising?

A Yes, I think we did and we got some compliments, too.

Q Do you remember a complaint by the Illinois Attorney General?

A I don't remember it.

Q Did you get one?

A I don't remember.

Q Do you remember a complaint by the Council of Better Business Bureaus of America?

A Yes, I do.

MR. TUROFF: Mr. Dorsa, Whirlpool's Exhibit W for identification.

(Defendant Whirlpool's Exhibit W was marked for identification.)

xx Q I show you a document which has been marked Whirlpool's Exhibit W for identification and ask you is that the copy of a letter you received on May 6, 1971 from the Council of Better Business Bureaus of America?

A (Examining).

Q That letter is addressed to you, is it not?

A Yes, I recall the letter. I just wanted to read it.

(Examining).

Q Did you finish reading it, Mr. Oreck?

A Yes, I read it.

Q Did you receive tht letter?

A Yes, I believe I did.

Q That is a letter of complaint, is it not?

A Yes, it is.

Q Are you familiar with the Council of Better Business Bureaus, Inc.?

A Yes, I am.

Q What is that organization?

A That -- the Council of Better Business Bureaus is a national Better Business Bureau which consists of a group in Washington made up of -- and they have members of -- located throughout the country and the president of the Better Business Bureau is Elisha Gray.

Q Oh. And Mr. Elisha Gray was also the chairman of Whirlpool Corporation at that time, was he not?

A Yes, he was.

* * *

* * *

Q Do you remember yesterday, Mr. Oreck, that Mr. Turoff asked you about the Ozite endorsement of the Whirlpool vacuum cleaner?

A Yes, sir, I remember that.

Q And then the following happened, he asked these questions and got from you these answers --

MR. TUROFF: May we have the page if you are going to quote the transcript?

MR. HOFFMAN: It is 536, I think.

Q You were asked the question and gave the follow-

ing answer:

"Q You are using that endorsement today, are you not?

"A No, sir."

And do you remember, sir, that at this point Mr. Turoff held up Defendant's Exhibit U for identification and asked you if you could identify it as a mailing of your company?

A I do remember that, sir.

Q Mr. Oreck, I show you Defendant's Exhibit U. Tell me, sir, is there a single word in that exhibit which relates to the Ozite endorsement?

A No, sir, we mention it nowhere in this letter. There is no such endorsement at all.

Q Did you ever use the Ozite endorsement for any other product than the Whirlpool upright?

A Never.

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MR. HOFFMANN: Your Honor, our next presentation is to read from depositions, and with your consent Mr. Agee will take the witness stand and play the role of the witness and my colleague Andrew Singer will ask the questions.

* * *

MR. AGEE: Your Honor, the first deposition will be the deposition of Jack D. Sparks of Whirlpool taken on seven different days -- August 1, 1973, August 2, 1973, September 11th, 1973.

Your Honor, we have a marked copy if it would suit your convenienc.

THE COURT: All right. Go ahead.

MR. SINGER: We are going to begin with August --

MR. AGEE: Wait a minute. I just want to position his Honor.

September 11, 1973, October 16, 1973, October 17th, 1973, May 21, 1974 and May 22, 1974.

Your Honor may notice that the first five dates were taken in a state action, but by stipulation between the parties they have been deemed to be incorporated for all purposes as federal depositions.

THE COURT: All right.

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